United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

74-1498

United States Court of Appeals

For the Second Circuit.

JAMES V. McLEAN, ETHEL McLEAN, JOSEPH LINFANTE and SUSAN LINFANTE,
Plaintiffs-Appellees,

against

L. P. W. REALTY COMPANY, LAWRENCE PAUL WOLF,
Defendants,

GULF OIL CORPORATION,
Defendant-Appellant,

JOSEPH JAMES, INC., and JOSEPH JAMES,
Defendants-Appellees-Appellants.

GULF OIL CORPORATION,
Third Party Plaintiff-Appellant-Appellee,

against

BEAMAN CORPORATION,
Third Party Defendant-Appellant,

and

UNITED PORCELAIN CO., INC.,
Third Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOINT APPENDIX.

Volume II—Pages 413a to End.

COPPOLO & D'ONOFRIO,
Attorneys for Third Party Defendant-Appellant, Beaman Corporation,
WILLIAM F. LARKIN, *Appellate Counsel,*
11 Park Place,
New York, N. Y. 10007

FUREY & MOONEY,
Attorneys for Defendant-Appellant and Third Party Plaintiff-Appellant-Appellee, Gulf Oil Corporation,
600 Front Street,
Hempstead, N. Y. 11550

A. ALLEN STANGER,
Attorney for Defendants-Appellees-Appellants, Joseph James, Inc., and Joseph James,
10 Columbus Circle,
New York, N. Y.

BERMAN & FROST,
Attorneys for Plaintiffs-Appellees,
77 Water Street,
New York, N. Y. 10005

ALEXANDER, ASH, SCHWARTZ & COHEN,
Attorneys for Third Party Defendant-Appellee, United Porcelain Co., Inc.,
801 Second Avenue,
New York, N. Y.

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1974

(4090)

UNITED STATES COURT OF APPEALS
FILED
AUG 1 1974
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

Index to Appendix.

	Page
Docket Entries	2a
Summons	12a
Complaint	13a
Answer of Defendant Gulf Oil Corporation	17a
Answer and Cross-Claim of Defendant Joseph James, Inc. and Joseph James	24a
Answer of Defendant Gulf Oil Corporation to Cross-Complaint	27a
Answer of L.P.W. Realty Co. and Lawrence Paul Wolf	29a
Third-Party Summons	31a
Third-Party Complaint	33a
Answer of Third-Party Defendant Beaman Corporation	38a
Answer of Third-Party Defendant United Porcelain Co., Inc., to Third-Party Complaint	43a
Amended Supplemental Complaint	45a
Answer and Cross-Claim of Defendant Joseph James, Inc., to Amended and Supplemental Complaint	50a

Page

Answer and Cross-Claim of Defendant Gulf Oil Corp. to Amended and Supplemental Complaint 55a

Answer of Third-Party Defendant, United Porcelain Co., Inc., to Supplemental Complaint 62a

Pre-trial Order 64a

Excerpts From Transcript 75a

Opening Statement by Mr. Ausubel 80a

Opening Statement by Mr. Winokur 181a

Opening Statement by Mr. Furey 182a

Opening Statement by Mr. Brill 198a

Opening Statement by Mr. Dubrowski 202a

Opening Statement by Mr. Haut 206a

Motions 635a, 667a, 752a

Summation by Mr. Haut 671a

Summation by Mr. Dubrowski 676a

Summation by Mr. Furey 685a

Summation by Mr. Ausubel 700a

Charge of the Court 725a

Page

Requests to Charge and Exceptions 745a

Verdict 789a

Motions to Set Verdict Aside 792a

Memorandum and Order 801a

Supplemental Memorandum 807a

Judgment Appealed From, Entered March 22, 1974 810a

Notice of Appeal by Defendant Gulf Oil Corp. From Judgment Entered March 12, 1974 ..... 813a

Cross-Notice of Appeal of Defendant Joseph James From Judgment Entered March 12, 1974 ..... 815a

Notice of Appeal of Third-Party Defendant Beaman Corporation From Judgment, Entered March 12, 1974 ..... 817a

Amended Judgment, Entered May 22, 1974 ..... 819a

Notice of Appeal of the Third-Party Defendant Beaman Corporation From Amended Judgment Entered May 22, 1974 ..... 822a

Amended Judgment, Entered June 28, 1974 ..... 825a

Notice of Appeal by Third-Party Defendant Beaman Corporation From Amended Judgment Entered June 28, 1974 ..... 828a

Cross-Notice of Appeal by Defendant Joseph James, Inc., From Amended Complaint 831a

Page

Cross-Notice of Appeal by Defendant and Third-Party Plaintiff Gulf Oil Corp. From Amended Judgment 833a

TESTIMONY.

Witnesses for Plaintiffs:

Beckett, Arnold E.:
E.B.T. 251a

Caso, Salvatore J.:
E.B.T. 359a

Leavin, Benjamin:
Direct by Mr. Ausubel 416a
Cross by Mr. Furey 427a
Cross by Mr. Brill 460a
Cross by Mr. Dubrowski 469a
Cross by Mr. Haut 476a
Re-direct by Mr. Ausubel 476a
Cross by Mr. Furey 477a

Leporati, Otto:
Direct by Mr. Ausubel 132a
Cross by Mr. Winokur 152a
Cross by Mr. Furey 154a
Cross by Mr. Brill 155a
Cross by Mr. Dubrowski 159a
Re-direct by Mr. Ausubel 164a

Linfante, Joseph:
Direct by Mr. Ausubel 557a
Cross by Mr. Furey 573a
Cross by Mr. Brill 591a
Cross by Mr. Dubrowski 598a
Cross by Mr. Haut 608a

Page

McLean, James V.:
Direct by Mr. Ausubel 376a
Recalled:
Direct by Mr. Ausubel (continued) 479a
Cross by Mr. Furey 491a
Cross by Mr. Brill 537a
Cross by Mr. Dubrowski 539a
Re-direct by Mr. Ausubel 555a
Re-cross by Mr. Furey 555a

Sadowsky, Gerald:
E.B.T. 287a

Spencer, Howard G.:
E.B.T. 318a

Wiese, Lincoln R.:
E.B.T. 238a

Wolf, Lawrence Paul:
E.B.T. 209a

Witness for Defendant Gulf Oil:

James, Joseph:
Direct by Mr. Furey 618a
Cross by Mr. Brill 622a
Cross by Mr. Dubrowski 623a
Cross by Mr. Ausubel 624a
Re-direct by Mr. Furey 632a

Witness for Defendant Beaman:

Spencer, Howard Gregory:
Direct by Mr. Dubrowski 646a
Cross by Mr. Haut 651a
Cross by Mr. Ausubel 656a
Cross by Mr. Furey 663a

EXHIBITS.

Plaintiffs' Exhibits:

	Admitted page
1. Mr. Leporat's report	146a
2 for Identification. Photograph of ice machine	147a
3. Lease	214a
4, 5 and 6. Agreements	246a
7. Document	269a
8. Document	327a
14A for Identification. Photograph	408a
14B for Identification. Photograph	408a
14C for Identification. Photograph	408a
14D. Photograph of remaining coping	415a
14E for Identification. Photograph	408a
14F. Photograph of remaining coping	415a
14G. Photograph of remaining coping	415a
14H. Photograph showing overhang after accident	411a

DEFENDANT GULF OIL'S EXHIBITS:

	Admitted page
A1-A4. Photographs	434a
B. Plan	460a

DEFENDANT BEAMAN'S EXHIBIT:

B. Sketch	669a

rka 89 McLean-direct

THE COURT: He couldn't have seen the original of these pictures. Have you got the photographer?

MR. AUSUBEL: No, I haven't got the photographer who took the pictures, but I think I have identified the remaining coping, and I think it is illustrative and of considered aid to the jury in this record, and I think I have laid a foundation. I am offering it to demonstrate that part which came off and that part which stayed on.

THE COURT: I don't see how this witness can know that.

You didn't see the picture of the building in this condition, did you?

THE WITNESS: I didn't see it in this condition because this has been removed.

BY MR. AUSUBEL:

Q You mean the overhang may be removed?

A Yes.

Q Other than the removal of the overhang, is that the condition you observed with respect to the missing coping on that first section and the remaining coping which had not fallen down?

A Yes, this is the coping in here that is supposed to extend right over here.

rka90 McLean-direct

MR. AUSUBEL: I offer it in,not for the purpose of identifying the overhang that came down, but for the missing coping and the coping that came down?

JUROR No. 5: Your Honor, may I submit, I am not mechanical. I know what a roof is but I don't know really what a parapet is and what a coping is from the picture. May I suggest, your Honor, if it please, that he just go over and draw it on the board, just the relationship; in other words, which comes first, the roof, the parapet, the coping, if you think it would help.

THE COURT: That is a good suggestion.

MR. AUSUBEL: I will have another witness who will be able to do that.

Would your Honor entertain a suggestion? Perhaps Mr. McLean could demonstrate with respect to something in the courtroom as to what constituted the coping and what constituted the parapet.

THE COURT: Let's wait until we see what we do with this picture.

Offhand, I don't see anything in this courtroom that will be helpful.

MR. DUBROWSKI: There is something, your Honor. May I approach the bench?

rka91 McLean-direct 40

THE COURT: Surely.

(Discussion at the side bar off the record.)

THE COURT: Nobody objected to this picture so it is going in without regard to the technicalities of the situation.

(Plaintiffs' Exhibits 14D, 14F and 14G were received in evidence.)

THE COURT: You have a suggestion to make?

MR. AUSUBEL: Yes, if your Honor pleases. I am prepared to put on a witness out of turn who is more technically trained and perhaps to assist the jury in following the nature of the construction of this roof so they are not at sea in following the testimony of these lay people.

THE COURT: That is a good idea. Introduce your next witness.

(Witness temporarily excused.)

MR. AUSUBEL: Mr. Leavin.

rka92

401

B E N J A M I N L E A V I N, called as a witness by plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. AUSUBEL:

Q Mr. Leavin, I don't have to caution you about keeping your voice up, you do a good job.

What is your home address at the present time?

A 5101 Collins Avenue, Miami Beach.

Q How long have you resided in Florida, sir?

A Three years.

Q Prior to that time where did you live?

A New York City.

Q What is your occupation or profession?

A Now I am retired, temporarily. I was a general contractor for 40-odd years. I received a license from the State of New York as a registered, licensed architect.

In 1917 I started my own construction business, during which time, and until 1952, during which time I built, supervised and erected every kind of a building, federal state, municipal, private industry, including even a section of the subway, piers, docks, apartment houses, chain

store operations, out of town in Washington, and many alterations of buildings, that included renovations, erection of large signs and so forth.

In 1952 I became a consultant to architects, engineers, owners, banks, lawyers on building construction problems.

Q Incidentally, one of the lawyers over the years that consulted you on matters was Mr. Furey?

A Yes.

Q In a number of cases?

A Yes. He is a gentleman.

THE COURT: You say you had to do with construction of federal buildings. I hope you had nothing to do with putting the elevators in this building.

THE WITNESS: I noticed when I came back here, these elevators run quite differently, and perhaps unnecessarily so.

Q We have a problem of our own so we will try to confine it to this problem.

Did you have experience with buildings that involved the construction of overhangs and perimeter lighting?

A Many buildings had overhang signs on roofs, on the face of buildings. Each one is different.

Q Were you familiar with the proper and accepted practices in New York State during the years 1965 and 1966 with regard to the construction of an overhang and permiter lighting?

A Each job is different, but there are usual methods of constructing overhead signs.

Q Were there usual, accepted practices with respect to what tests and inspections should be made before a job of that kind was undertaken?

A Usually some engineer, architect or somebody that owns the building will order somebody to make a physical inspection of the area involved where a sign will be erected.

Q When you talk about a sign you are referring to an overhang?

A Overhead sign or a sign on the face of a building.

Q Did there come a time when you were requested to make an inspection of a Gulf service station located at the corner of 116th Street and Eighth Avenue in Manhattan?

A Yes, there was.

Q First, when were you so asked?

A About the first week in August.

Q 1966?

rka95 Leavin-direct

A Yes.

Q Who requested you to make that?

A Vaccaro & Osborne, attorneys, 312 Forest Avenue, Paramus, New Jersey.

Q Did you learn that those gentlemen were representing an injured workman by the name of McLean?

A I did, afterwards, yes.

Q After you were requested to make this examination did you go down to the service station?

A I went to the service station a few days after that.

Q When you got to the service station what did you do?

A I made a quick observation for a moment and found a manager by the name of Saundargo. He said he was the manager of the building and I spoke with him, and he told me that although he was across the street he saw what happened, and I engaged him to tell me what were the facts or his own statement.

Q After you spoke to the manager, what did you do?

A I borrowed a ladder, an extension ladder.

We placed the ladder against the face of the building and I climbed the ladder and noticed that the

southerly part, which is about 18 feet on the wall level, was missing and that part of the northerly end had already been up.

THE COURT: Had been what?

THE WITNESS: The sign had been up. There was some part of the sign that had already been up.

THE COURT: What did you say was missing?

THE WITNESS: The top of the wall at the roof level. I want to explain some things here. There is confusion here, and I would like to tell you all what this is.

The front part of this building, this is the face of this service station, the front part of the exterior wall is called the face of the building. The part of the brick wall, the exterior wall that projects beyond the roof of the building, is called a parapet, which is ordered by the Code to be built as an extension to prevent people from falling off the roof.

On top of this parapet wall, which in this case was eight inches or 12 inches, I am not sure, there was a coping. A coping is a piece of natural stone or formed, cast concrete that is laid upon the top of this wall merely as an architectural dressing or a finish to the top of the wall, which we usually do to protect the

rka97 Leavin-direct 406

water from disintegrating into the joints of a wall building and prevent it from disintegrating and because it looks pretty to have this little run-around thing on top of every building. It has no function other than to look architectural, to finish off a wall.

THE COURT: The coping lies flat on top?

THE WITNESS: Yes.

THE COURT: It does not project over?

THE WITNESS: It projects one inch on either side of the thickness of the wall.

A coping usually cast. It can be cast anywheres, in a form, two, three feet long, anywheres from three to six inches, leaving it dry or placing it wet, placing it on top of the wall two inches wider than the thickness of the wall.

The bracket is usually furnished on the job where all materials, and this being a gas station where there is activity on the sidewalk, the materials are taken up on the roof and laid there.

On this face of the building they put fascia plates. That is a piece of narrow metal that is bulted to the side of this brick wall. It may be about an inch away. It's a channel, really. A piece of flat iron with an edge of this. It is fastened to the wall so it has a space in here.

On top of this fascia is a triangular bracket, three sides. The base of this triangle is bolted to this wall and part of it goes into these fascias eight or nine feet away against this wall.

This bracket projects 30 inches out, 30 inches, made of solid aluminum. The outside part runs which has a lateral pressure against the wall, and the top of this bracket went over this coping and down about three or four inches.

The top of this bracket -- as someone called it the roof -- it really isn't the roof, it is just the exterior face of the top of this bracket which, at a slope, allows the water or snow to run off and down onto the roof. Thst is the roof of the bulding.

Standing on a ladder, I looked up into this space and saw that part of the parapet wall, which is this wall which projects beyond the roof, beyond the roof of the building, of the surface, was missing on the 17 feet. I saw concrete coping on top of the parapet where the sign was.

THE COURT: You saw what?

THE WITNESS: The concrete coping. I saw that on the wall that had been in place, but all of this 18 feetwas entirely missing.

I then took some photographs and presented a report afterwards giving my opinion.

Q Did you at that time study the plans that were prepared on behalf of Gulf in connection with this job?

A Yes, I did.

Q Did those plans call for the placing of the top of that anchor or bracket that you described across the coping?

A It described the top of the bracket going beyond and over the top of the wall. The plan does not indicate whether the top of the wall was only brick or did it include a three-inch piece of concrete coping.

There is no indication, no mark, no reading at all to tell me what it is. I presume it is the top of the wall, and since I have seen the coping in place it must have been the top and over the coping which was over the wall. It is a corrugated top of the brackets which went over the side of the roof.

Q What was the proper practice that prevailed in 1965 and 1966, by such as Gulf who decided to make that kind of improvement to the building, before the job was let out?

rkal00 Leavin-direct

MR. FUREY: I object to the form of the question.

THE COURT: In the first place, was there.

BY MR. AUSUBEL:

Q Was there a custom and practice that prevailed in New York in 1965, 1966 with respect to any inspections that should be made before the work would be let out?

A There is also the duty of those who owned the building. In this instance I understand Gulf --

MR. FUREY: I move to strike that out.

THE COURT: Do you know who owns the building?

THE WITNESS: I read a letter which states that they directed someone.

A Whoever owns a building is responsible for the working of a building or who is going to order the alteration should have sent somebody who is responsible to examine that part of the wall that will be included in the support of the signs that may be imposed upon it.

Q I want you to assume, Mr. Leavin, that Mr. McLean and Mr. Linfante -- did you hear Mr. McLean's testimony as to the accident, the manner of the occurrence

rka101 Leavin-direct

of the accident?

A Part of which I heard before.

Q Did you hear him testify this afternoon?

A Yes.

Q Without my repeating the facts as he described, the manner of the occurrence of the accident, if I gave you those facts in a hypothetical question would you have an opinion with a reasonable degree of certainty as to what caused this collapse?

MR. FUREY: Objection.

THE COURT: What ground?

MR. FUREY: I don't know what facts Mr. Leavin heard or didn't hear.

THE COURT: He said he heard the whole testimony of Mr. McLean as to how the accident happened?

MR. FUREY: I object to it. I would look to know what his opinion is based upon. He owes it to the jury and to the court to state what basis he is relying on it.

THE COURT: You heard Mr. McLean's testimony?

THE WITNESS: I did.

THE COURT: Does that testimony enable you --

THE WITNESS: Yes, it does.

THE COURT: You can cross examine on that.

Q What is your opinion, sir, as to what caused this collapse?

MR. BRILL: I object because counsel is asking the witness for a conclusion in a province that is strictly before the jury.

THE COURT: All conclusions are for the jury.

Do you challenge his expertise?

MR. BRILL: It isn't a matter of expertise.

THE COURT: He is offering an expert opinion as to what caused the collapse and I want to explain to the jury that they don't have to pay any attention to it if they don't want to, but they are entitled to hear it.

A I believe that the cause of this accident was the movement of the part of a wall which I will call the parapet or the coping, that moved from off its base. This was the base and when these men were there, this was not solid. Somewheres there was a loose joint and when these men --

MR. ADELMAN: I object when he says there might have been a loose joint.

A It must have been a loose joint to have the

wall move, sir.

MR. ADELMAN: Please don't yell at me. I can hear you.

THE WITNESS: I am sorry, but I enjoy it.

THE COURT: It must have been a loose joint.

MR. AUSUBEL: You may inquire.

THE COURT: Would you like to cross examine now or after the plaintiff's case?

MR. FUREY: I would like to cross examine now.

THE COURT: Why don't we take a short break.

(Recess.)

(In open court; jury present.)

THE COURT: Proceed.

CROSS EXAMINATION

BY MR. FUREY:

Q Mr. Leavin, did you make a report for the attorney on this matter?

A I did.

Q May I see it?

Mr. Leavin, did you determine when this building was built?

A At that time I thought it was an older building, but I found out it was built in 1957.

rka104 Leavin-cross

Q So your statement that you thought it was an old building is incorrect?

A I wouldn't say it was new.

Q Is there anything else in your report which you subsequently found out to be erroneous?

A Pardon?

Q Is there anything else in your report that you found out to be erroneous?

MR. AUSUBEL: I object to this.

THE COURT: He has admitted one error. He is perfectly free to ask him about any others.

A You made an exception about Gulf Oil.

Q My question is is there anything else that you put in your report that you later learned to be in error aside from the fact it was an old building?

A The way the bracket, the top of the bracket protruded over the coping wall, not knowing whether that coping was stone or concrete. From the plan, I don't know.

Q Could you tell from your inspection of the premises that day whether the coping was stone or concrete?

A Yes. I observed on top, when I was on top of the ladder, I looked on top of the part of the sign, the sign that had been in place, and I saw a three-inch

coping on top.

Q Could you see it was concrete at that time?

A Yes, concrete.

Q Now, sir, were you under the impression when you gave your opinion to the attorneys initially that Mr. McLean and Mr. Linfante were kneeling on the coping when they had the accident?

A They told me they were kneeling.

Q On the coping?

A On the wall.

Q Sir, take a look at your report and tell me what they told you about where they were kneeling.

A There is nothing wrong there.

Q Did Mr. McLean and Mr. Lanfante tell you that they were kneeling on the coping at the time of the accident?

A Yes, I think they did.

Q And you heard Mr. McLean testify to something different today, didn't you?

MR. AUSUBEL: Just a minute. I object to his characterization.

A No. What they said is exactly what -- what he said today is exactly or nearly what he told me over the telephone eight years ago.

rka105 Leavin-cross

Q You gave an opinion, a hypothetical -- an answer to a so-called hypothetical question which didn't incorporate any fact but did incorporate Mr. McLean's testimony today, is that right, sir?

A I don't understand.

THE COURT: The question is, your opinion was based on Mr. McLean's testimony?

THE WITNESS: Yes, on what he told me, in some respects.

Q Sir, did you, in formulating your expert opinion here, determine that Mr. McLean testified in any way contrary to what he testified he told you back in 1966?

A I can't answer that properly. Really, I want to.

THE COURT: Did you hear Mr. McLean say anything different on the witness stand than what he told you in 1966?

THE WITNESS: No, your Honor.

Q Did you hear Mr. McLean testify that he was out on the overhang itself when the accident happened?

A Yes, I heard him say that.

THE COURT: Isn't that different from being the coping?

THE WITNESS: No.

Here is the coping of the wall. Here is a bracket protruding 30 inches. From what I gather from what he said to me me today and eight years ago, they were standing on top of what was either the wall or the coping, reaching out to put in the strip of lighting which went into that fascia that went all around the side.

Q In your opinion, in your expert opinion, it was based upon the assumption that at the time of the accident, Mr. McLean and Mr. Linfante were standing on top of the coping, is that right?

A Yes.

Q And if that fact is not correct, then of course your opinion may be different, is that right?

A Only in that it will be coping or a wall or top of the wall, whatever it is.

Q Your opinion is based necessarily, sir, upon the assumption that Mr. Linfante and Mr. McLean were standing either on top of the wall or on top of the coping?

A They were kneeling. He told me they were kneeling.

Q You told me they were standing. I said kneeling before.

A Kneeling on top of the wall.

Q And that fact, sir, is necessary to your opinion, is it not?

A Well, it's part of my opinion. That wall was loose before they kneeled on that. Those two men haven't the power to move 14 or 16 inches of brickwork for a distance of 17 feet. That wall at the base must have been loose before they kneeled on that wall.

Q If they did.

A They tell me they did.

Q You say there was brickwork that was moved, Mr. Leavin?

A I think so.

Q You were up there and you inspected it on the ladder?

A I didn't see any brick there because it had fallen or gone, disappeared.

Q The coping was missing, is that right?

A The coping and the wall, yes.

Q Did you see any piece of wall that was missing when you made your inspection?

A Sure.

Q Did you take these pictures, sir?

A No, I didn't.

rka108 Leavin-cross

Q Do you have the pictures you took?

A No.

Q Where arethey?

A I haven't got them.

MR. FUREY: May I call upon Mr. Ausubel to produce Mr. Leavin's pictures since he testified he took some.

Q Are these your pictures, Mr. Leavin?

A Yes, they look like my pictures.

Q Did you take any others or are those the only ones?

A I think there were three pictures I took.

Q That is how the station looked when you made your inspection, right?

A When I was there, yes.

MR. FUREY: I offer these in evidence, your Honor.

THE COURT: Any objection?

MR. AUSUBE: May I have a couple of questions of the witness.

VOIR DIRE EXAMINATION

BY MR. AUSUBEL:

Q When you took these photographs, this was in August of 1965?

rka109 Leavin-cross

A Yes.

Q And at that time they had already put in a new overhang throughout the entire length of the building?

A Yes, I am told.

Q At that time you still found some of the missing pieces, is that correct?

MR. FUREY: I will object to this. This is not on qualification.

THE COURT: This doesn't qualify the picture.

Q These conditions were as of August --

A As I saw them.

THE COURT: That is established.

MR. AUSUBEL: With that understanding that they were taken in August of 1966.

MR. HAUT: May I see them?

(Pause.)

MR. DUBROWSKI: No objection.

THE COURT: It's received.

(Defendant's Exhibits A1 through A4 were received in evidence.)

CROSS EXAMINATION CONTINUED

BY MR. FUREY:

Q Mr. Leavin, how big was the ladder you borrowed

rka 110 Leavin-cross 42

to make your inspection?

A It was an extension ladder that went 20 feet.

Q Can you mark with a pencil somewhere on these photographs where you put the ladder up?

A Yes. I am going to guess.

Q Do you remember, Mr. Leavin where you put the ladder? I don't clearly remember. I know I had to get out of the way two or three times. I hesitate because when I observed the fallen wall, or the wall that was missing above, I was at some location when I looked above and saw part of the wall that had collapsed.

I am not sure what part. I did stand on that ladder, I did take photographs and I saw a part of the wall that had moved away.

Q Mark it according to your best recollection of where you were with the ladder, Mr. Leavin?

A That I wouldn't stand for.

Q Are you marking them?

A No, I am not marking these. I don't know whether these are mine or not. I can't mark. I don't remember that and I am not going to guess.

Q When you put that ladder up against the building, Mr. Leavin, did you put some ladder up against part of the overhang?

rkall Leavin-cross

MR. HART: I object to this line of questioning. It bears no relevance to the issues in this lawsuit. It's a goodly period after the accident and there are changed conditions.

THE COURT: Overruled.

You may answer.

A Repeat that.

Q When you put the ladder up against some part of the building did you put the edge of the ladder against some part of the overhang?

A Underneath the overhang.

Q Was the ladder fully extended?

A About a foot above the level of the roof. When I say roof I mean the wall, really. Above the wall.

Q Well, sir, you had the top of the wall, which is covered by the coping initially, as we understand it?

A Yes.

Q Was the top of the ladder above or below that highest point of the building?

A Below.

Q How far below, sir?

A The building is around 15 feet. I must have been around 11 feet up or 12 feet up.

rka112 Leavin-cross

Q When you say 11 or 12 feet up, are you talking about your head?

A Yes.

Q At that time, sir, could you see the coping, for instance, when you were up there on the ladder?

A No. I saw a white edging which I thought might have been coping. I don't know what it was.

Q Did you look at the entire portion of the building or just where you put the ladder up?

A Just where I put the ladder up.

Q Did you put the ladder up in only one location?

A No, three or four locations, some of which I saw completed in which I only made an observation, a notation of it.

Q On the three or four occasions when you put the ladder up did you see the same white strip in all of these locations?

A No.

Q There was one location where the white strip was missing?

A It was missing.

Q And that area where the white strip was missing, that led you to conclude that that was an area where the coping was removed.

rkall3 Leavin-cross

A Where the coping had fallen.

Q Did you see any missing bricks?

A I saw nothing. It was all cleaned up when I got there.

Q Did you see any bricks missing from where you would expect to find them in the wall?

A No.

Q Did anybody ever tell you that any bricks fell down?

A Somebody, the manager told me that this entire thing fell down.

Q Aside from the manager, you spoke to Mr. Ausubel, I take it, Mr. McLean and Mr. Linfante?

A Mr. McLean only by telephone.

Q Did he tell you any bricks fell down?

A Some bricks and the coping fell down.

Q Is that what he told you?

A Yes, I think so.

Q Was that the same conversation when he told you he was kneeling or standing on the coping?

A They were kneeling on the wall.

Q Was that in the same conversation, sir, in which he told you he was kneeling on the wall?

A It could be, I don't know.

rhall4 Leavin-cross

Q Did you have more than one conversation with him?

A I think one conversation over the telephone. I think I called twice. I think once I called he was very ill and couldn't talk to me at all, and I called him back later and he gave me a two- or three-minute recitation of what happened there and what I heard today.

Q I show you Plaintiff's Exhibit 14C. You see that?

A No.

Q You see the picture right in front of you?

A Yes.

Q Do you see any bricks missing?

A Could be, yes.

Q Please circle where the bricks are missing, will you, Mr. Leavin?

A Sure. Right here. The top.

Q When I asked you about bricks missing, we understand we are not talking about the coping, is that right?

A Let's see --

Q Tell us the difference between bricks and coping.

rkall5 Leavin-cross 426

A I can't tell by that picture. I note that some material is missing because that fascia piece must have been anchored to a course of brick and only part of that is there.

Q Sir, so we understand each other, there is a difference between bricks and coping, is there not?

A Yes.

Q The bricks make up a body of the wall?

A Yes.

Q And the bricks are for the purpose of the wall, the bricks are weight-bearing?

A Yes.

Q And the coping is only decorative?

A Yes.

Q And the coping is made of concrete?

A Yes.

Q In this case?

A Yes.

Q Are you telling us that in looking at that photograph there are bricks missing as opposed to coping being missing?

A Something. I don't know. I know a course of material is missing from the top of that wall.

Q Would you show it to his Honor?

A The fascia, that piece of metal, is standing

up there. That must have been drilled into something, and everything else is missing.

Q Areyou telling us in that open space there you can't tell whether that is missing coping or missing bricks?

A No.

Q You can't tell?

A No, I can't.

Q Mr. Leavin, you were asked by Mr. Ausubel about certain plans that you reviewed. Do you have those plans here?

A No, I haven't.

Q When did you review them?

A This morning.

MR. FUREY: Are they in evidence?

MR. AUSUBEL: No, not yet.

Q In any event, from these plans, Mr. Leavin, there is no indication that the overhang was to be anchored to the coping, or over the coping, I think you said, is that correct?

A Not the base of the trianble, but the covering that goes over the top of the bracket, goes over the top of the wall and comes down.

Q But the brackets themselves, they were to be anchored into the brick wall.

rkall7 Leavin-cross

Q Incidentally, sir,at the time you inspected and saw what you thought was missing coping, was the overhang fully finished and in place at that time?

A No, it was all down.

Q When you made your inspection?

A Yes.

Q Would you show us where in these pictures, sir, everything is all down?

A I can't tell you. It doesn't show it there.

THE COURT: Then how could you have taken those pictures?

THE WITNESS: I don't know for the minute. I can't answer that, your Honor.

Q Sir,as far as these pictures go, do they show the gas station as it existed at the time of your inspection?

A Yes.

Q Don't they show the whole front of the gas station?

A It shows the gas station but it doesn't show what I saw.

THE COURT: It does not show what you saw?

THE WITNESS: No.

THE COURT: Then perhaps you didn't take those pictures?

THE WITNESS: I took those pictures. I learned to take pictures well.

Q Canyou give us any explanation as to how we come to have different pictures here today?

A These must be my pictures.

Q Do they show the gas station as it existed at the time you nade your inspection and took those pictures?

A Yes, it does.

Q Doesn't it show the whole front of the gas station?

A Yes.

Q Isn't the overhang completely finished and in place in all of those pictures?

A Yes, it does.

Q At the time thatyou saw the piece of coping which you say was missing, was the overhang completely up and in place?

A No, it wasn't.

May I refer to this for a minute?

"Photograph 2, the most southerly end of the overhang, sign in place" --

rka 119 Leavin-cross

429

MR. FUREY: May we instruct Mr. Leavin to read it to himself.

THE COURT: Don't read it out loud.

THE WITNESS: I have it.

Q Will you tell us what happened to the pictures?

A These are my pictures.

Q Mr. Leavin, you told us previously that it will be a good idea for the owner or the person who ordered the work or the person who occupied the station to do an inspection, is that right?

MR. AUSUBEL: I object. He didn't say it is a good idea. He said that the custom and practice required it.

THE COURT: That is what he said.

Q Did you say that?

A Yes.

Q The custom and practice, is it usual to get an architect to lay out a job?

A Lay out a job or an engineer, somebody that has the education, the training, to know whether a place is safe.

Q And it is good custom and practice for somebody say, who is in the oil business rather than the custom

rka120 Leavin-cross

business to rely on an architect or engineer?

A No. There are architects that make specialties of doing this.

Q What I amsaying is, for instance, if I as a home owner want to get a job done, it's reasonable for me to rely on an architect or builder or engineer to inspect it and lay out the job?

A Yes.

THE COURT: You don't have to do it yourself, that is what he is getting at.

THE WITNESS: No.

Q From these plans that Mr.Ausubel asked you to read, it is reasonable that Gulf had an architect look this job place over and lay out the job?

A Yes.

Q And it is reasonable for them to rely on such an architect?

A Yes.

Q In the custom and practice of construction and alteration work, when a man comes on the job or when two men are sent out to do a job, they look the thing over before they do the job?

A They look where they are going to work to see that they are safe, but they are not in a position to

rka121 Leavin-cross

move a wall to see that it is loose?

Q Before they stand on something, they generally take a look at it.

A How much does a man look at a wall where he is going to work? He doesn't know.

Q You have no way of knowing, do you, what an inspection of this wall would have shown before this accident occurred?

A This wall might have shown --

MR. FUREY: May we have the question reread.

THE COURT: Reread it.

(Question read.)

A A physical inspection of that wall would have shown that some part of that wall, either at the base or somewheres within the parapet, was loose.

Q And that would have been perfectly obvious to somebody who was up there in that area and looked at it, sir?

A No. He would have to make a minute inspection. When men go up on a job to do something they are not going to get down and look at a wall to see that there are cracks in the wall. They assume the plan has been approved and that the design is right

rka122 Leavin-cross

and that the wall is correct, but surely they wouldn't go to examine a wall on a roof.

Q Is there anything wrong with this plan, as far as you know?

THE COURT: The plan that you examined.

A Some things, yes. For instance, the top of the wall. I don't know whether there was a coping there.

Q You don't know, sir, but maybe the registered architect who drew that plan knew, isn't that right?

A He would show it here but he doesn't show it.

Q Maybe he didn't know there was going to be a lawsuit.

MR. AUSUBEL: Your Honor.

A The plan shows --

MR. FUREY: Would you instruct the witness there is no question?

THE COURT: You asked him in general is there anything wrong with the plan. I assume that is an open-ended question.

A Mr. Furey, the angle, there is a little angle against the wall, is fastened or drilled into the top of that wall. That wall could have been the coping.

If it did, it might have cracked the coping. I don't know, but it shows that the bracket is fastened to the top of that wall.

MR. FUREY: Your Honor, I move to strike out what might have been and could have caused.

THE WITNESS: Right here, your Honor, we don't know whether this is brick or concrete. There is an angle that is bolted to the top and bolted into that top. That could have cracked it and they would not know.

Q What you are saying, Mr. Leavin, the men who were doing the drilling may have caused the crack, is that right?

A I don't know. They might have.

Q You are just guessing?

A I don't know.

Q You say that coping extended an inch out from the brick wall?

A Yes.

Q So obviously you couldn't put the top part of the bracket into the coping, otherwise it would hang down.

A This is only the thickness of the coping, which is three inches, as I measured it. The angle we have here now is two and a half inches, which should have

rka124 Leavin-cross

been placed up against the face of the coping.

Q Those brackets were designed to be fastened in a vertical plane, is that right?

A Yes.

Q And if you fastened the top part of that bracket to the coping, it wouldn't be vertical any more?

A That has nothing to do with what is on the fascia. The little angle on top is fastened to the coping, whatever it was.

Q A minute ago you said you didn't know whether it was the coping. Now you are telling us it was.

A This angle is fastened to the very top of the wall. Let's call it what we want. I don't know.

Mr. Leavin --

THE COURT: Is this plan going to be in evidence?

MR. AUSUBEL: If Mr. Furey isn't going to offer it, I can assure you I will.

THE COURT: If it is going to be in evidence, why don't we put it in so we know what we are talking about.

Any objection?

MR. DUBROWSKY: I would like to look at

rka125 Leavin-cross

it.

(Defendant's Exhibit B was marked for identification.)

BY MR. FUNNY:

Q In any event, what that plan shows or doesn't show, it is reasonable for Gulf to rely on plans they get from a registered architect, isn't it?

A I would think so.

Q Do you know how these brackets were affixed to the wall?

A No, I don't.

Q And as far as whether or not there was anything drilled into the coping, certainly the workmen who did the job would know?

A They would know.

Q Were you able to tell from your inspection whether or not, when that overhang was up and in place, anything was drilled into the coping?

A No, I couldn't tell.

Q Sir, aren't you right up there with your head a foot below the overhang?

A But I didn't look for whether that little angle was drilled to the coping or the top. I know it was drilled to something.

rka126 Leavin-cross 436

Q In the area where the coping was missing, did you have the ladder right up there where the coping was missing?

A There was nothing there, no wall was there.

Q No wall was there?

A No wall was there.

Q No wall was there.

A No wall was there.

Q What didyou put the ladder up against?

A To see the wall, the top of the wall, and I think the picture shows it. This is when I saw it.

Q When you put the ladder updidyou put the ladder up so your head was just a short distance below the overhang?

A About two feet under.

Q Did you tell us you looked up and you saw that the coping was missing when you looked up?

A Yes.

Q When you looked up did you do so where the overhang was fastened?

A No, there was no sign there at all.

Q I am not talking about a sign, I am talking about the overhang.

A There was no overhang there.

rka127 Leavin-cross

Q Was that the same day those pictures were taken, sir, that you put the ladder up against the wall?

A I must say yes, but it is a mystery to me here at this moment.

Q Mr. Leavin, did you put the ladder up in any area where there was overhang that day?

A No, I don't remember. I am confused about this.

Q Are you telling us you can't remember whether there was any overhang at all in that station when you visited it in August?

A There was no overhang in one part that I saw

THE COURT: Then these pictures must have been taken at another time.

THE WITNESS: Your Honor, I climbed the ladder and stood there and saw this.

THE COURT: That seems to me to lead to the conclusion that those pictures must have been taken at some other time because it appears there is overhang all the way around.

THE WITNESS: I can't answer this, I don't know. I am positive that I saw it and took a ruler out and measured the 17 feet.

Q Was there any portion of that gas station that

that had some portion of overhang on it where you put the ladder up?

A I did measure 17 feet of this overhang on the side of the building.

Q Could you tell us --

A What did you say?

Q Would you tell us, Mr. Leavin, you put the ladder up three or four times that day, right?

A A few times.

Q On those occasions was there any place where you put the ladder where there was overhang up above you?

A I can't honestly answer that.

Q And you have no recollection, sir, or do you, as to how this overhang was affixed to the wall?

A No, I don't.

Q Sir, would you agree that the overhang was aou about 30 inches wide?

A It was.

Q Sir, there are certain requirements for scaffolds in the State of New York under the rules of the Industrial Code, the labor laws, are there not?

A There are many.

Q In order to have a scaffold which is accept-

rka129 Leavin-cross

able and in accordance with good practice, it has to have a handrail around it, is that right, a guard rail?

A In some places.

THE COURT: Is a scaffold relevant to this case?

MR. AUSUBEL: I was about to rise. I don't understand this line of inquiry.

THE WITNESS: A scaffold is not necessarily here, your Honor. You can take these things off from the sidewalk or the truck and lift them up to the roof. I can't leave two ladders there and with this flimsy thing and with working going on to raise up and put a few things. Men don't do that. They get rid of it right away. They don't need scaffolding here.

Q Would it be bad practice to use 2 A ladders with a plank between them to put the overhang up?

A You couldn't stand ladders there because men --

Q I misunderstood your answer, sir.

You are saying it would be bad practice for these men to use 2 A ladders with a plank between them in order to put the brackets on the wall?

A It would be unsafe.

Q It would be unsafe to use 2 A-frame ladders?

A You have traffic down below.

Q Please, one at a time.

rha130 Leavin-cross

A Excuse me. Go ahead.

Q If I asked you to assume that two gentlemen working on a job like this set up two A-frame ladders and put a plank between them and worked off this plank to put brackets up on the wall to put the overhang, are you telling us that would be bad practice?

A Bad practice.

Q Negligent?

A Negligent.

Q In the event that workmen are going to work in an elevated area, if they are working on a platform, one type or another, that is called a scaffold?

A You said scaffold. You tell me what you mean by a scaffold. You said a plank before.

Q I am talking about something else now. We are through the A-frames and the plank.

A All right.

Q With regard to an elevated work area, a platform, is that in accordance with the custom and practice of your business of a general contractor, is that a scaffold?

A That is a scaffold, yes.

Q If it is a scaffold, then there are certain

rk-1f-131 Leavin-Cross

requirements that the employer must provide for scaffolds, isn't that right, under the rules of the Industrial Code?

A Under conditions.

MR. HAUT: I object to that. There is no talk of that. We are not talking about that in this case as to what requirements would be in another situation.

THE COURT: I don't know where we are going. Maybe counsel will show me.

Q If you had a platform 30 inches wide fifteen feet above the ground, that would be a scaffold, would it not?

A Yes.

Q And it should have handrails?

A Up on top, yes.

Q And if it didn't, that would be a dangerous situation, would it not?

A Yes.

Q Sir, if this same scaffold were affixed by anchors into a brick wall only on one side, would that be a dangerous situation?

A Sure. I never saw it on the sidewalk. Why put an anchor on it?

Q Sir, if two workmen were using an overhang of 30 inches wide for a scaffold, that would be very bad practice, wouldn't it?

rk-lf-132 Leavin-Cross

MR. AUSUBEL: I don't know where scaffolding has anything to do with this case.

THE COURT: He has a technical definition of scaffolding which according to him comprising this overhead.

MR. FUREY: It's what Mr. Leavin said.

THE COURT: You gave him the question, he answered it, yes.

Q Sir, if two workmen were using a scaffold 30 inches wide anchored on one side only into a brick wall with four brackets with no handrail around it, that would be a dangerous situation?

A Sure, someplace, I don't know where that might be.

Q In accordance with good custom and practice, if you assume that Mr. McLean and Mr. Linfante in order to put lights in place got out and stood on this overhand, that would be bad practice?

A To stand on the overhang?

Q Or kneel on the overhang.

A No, there is nothing wrong about that. They were using that --

Q Aren't they using that overhang for a scaffold when they are doing that?

A Certainly.

C Didn't you just tell us that this thing was not fit

rk-1f-133 Leavin-Cross

to be a scaffold?

A I didn't say anything about that at all. You never mentioned to me about them using the top of that bracket -- that is a platform.

Q Sure it's a platform.

A And they put a plank on that and they laid on that with their knees and bent over and put the rivets in.

Q What was it, did they get out on the overhang or were they kneeling on the parapet?

MR. AUSUBEL: Your Honor, this is repetitive. We are going over this time and time again.

THE COURT: Overruled.

Q Which is your opinion based on, Mr. Leavin, that they were kneeling or standing on the parapet or that they went out on the overhang?

A They were kneeling on the wall which was part then -- where their weight was and they were stretching over the parapet to insert the strip for the lighting.

THE COURT: His question is: would it change your opinion if the facts turned out that they were kneeling not over the wall but over the overhang further out?

A If they kneeled entirely on the overhang, it might have been strong enough because it will take more than 40 pounds a foot, but I doubt whether they would dare lay over

rk-1f-134 Leavin-Cross

entirely on the overhang when they had part of the wall to lay on, just on this railing there. Their body was here, their head was here with their hands and their feet inside on the roof area.

Q You doubt very much if they would dare to put their entire weight on this overhang?

A They wouldn't dare do it.

THE COURT: If they did do it.

THE WITNESS: I don't know how strong that overhead is.

Q Would you agree if they put their entire weight on that overhang, it would be foolish and reckless on their part?

A It would be foolish.

MR. FUREY: Nothing further.

THE COURT: I take it there are no objections to this.

MR. BRILL: Your Honor, speaking for myself, I can't decipher it because whatever is written on there is so minute.

THE WITNESS: It's impossible to read it.

THE COURT: Are you objecting to it on that ground?

MR. DUBROWSKI: I do, your Honor, I can't see what it says. I can't read the fine print on the last big page.

THE COURT: All but the fine print is accepted and

rk-1f-135 Leavin-Cross

if you need a magnifying glass for the fine print, you will have another opportunity to object.

It's received in evidence except for the fine print and if there is to be a magnifying glass for the fine print, all parties will have another chance to object after reading that.

(Defendants' Exhibit B received in evidence.)

CROSS EXAMINATION

BY MR. BRILL:

Q Mr. Leavin, do I understand you made this inspection close to eight years ago at the request of a firm of lawyers?

A Yes.

Q Do you have any independent recollection of the events or are you relying upon what you wrote in this report?

A Independent recollection of that.

Q If you said in this report back in 1966 that certain things were observed by you, would you say that since it was that much closer in time to the event, that your recollection then was better than it is today?

A No, it's just as good today as it was then.

Q If you said in this report in several places that the plaintiff that you spoke with, the attorney's client, told you he was on the coping --

MR. AUSUBEL: Read what he said.

rk-1f-136 Leavin-Cross

Q You said in here that at the attorney's request you spoke with the attorney's client, is that right?

A Yes.

Q And you spoke to him several times at his home?

A That is right, on the telephone.

Q Then further down you say when they were working at the southerly end, the three inch concrete coping upon which they had been kneeling came away from the wall.

A Yes.

Q That is the way you understood the facts at that time?

A That is right.

Q And this was shortly after the accident had occurred?

A That is right.

Q Then further on on the next page of your report about midway down the page, you said that the coping had not been laid nor anchored properly but must have been loose and when the men rested on the same in the performance of their work, this loose, unanchored coping gave way which caused the accident?

A Yes.

Q If the plaintiff who gave you this statement in reality were kneeling, kneeling on this 30 inch overhang,

that would be totally different than if he was kneeling on the overhang which was part of the parapet?

MR. AUSUBEL: I object to this. This is not what Mr. McLean testified to and I believe it's an improper characterization of the proof in this case.

THE COURT: The proof in this case is not completed. If it doesn't turn out there is any proof to support this question, it wouldn't help anyway.

You may answer the question.

(Record read)

A He was kneeling on the wall and stretching out over the parapet. The weight of his arms must have been beyond the width of the wall. His body rested, as I understand it, rested on the wall which was covered with part of the metal that extended out to the edge, or 30 inches out to the edge of the bracket.

Q If he were kneeling on the coping and the parapet extends out two and a half feet from the face of that building, he doesn't have the same balance, nor does he put --

THE COURT: Don't argue with the witness. He wasn't there.

The question is: you weren't there, I wasn't there and nobody else was there.

If the jury should find he was kneeling not on the

rk-1f-138 Leavin-Cross

wall or the coping, but he was kneeling beyond and on the overhead, I understand from what you said to the previous attorney's questions, that would be foolish on his part.

THE WITNESS: Yes.

Q At the time that you were getting this information from Mr. McLean, did you ascertain from him where Mr. Linfante was at the time this occurred?

A I never knew the man's name.

Q You referred to him as the helper?

A Yes.

Q Did you ascertain from Mr. McLean where his helper was?

A No.

Q At no time, if I understood the answers to the previous questions by Mr. Furey, at no time did you inspect this parapet wall, is that correct?

A No.

Q So you couldn't tell us how many courses of brick constituted the parapet?

A I can only guess. About four courses.

Q By four courses, we mean four lines of bricks?

A One on top of each other.

Q I am talking about the width.

THE COURT: How many bricks wide was the parapet?

rk-1f-139 Leavin-Cross

THE WITNESS: The parapet runs longitudinally.

THE COURT: He means how thick.

A I didn't measure that. I think it was eight inches with a ten inch hooking.

Q Am I now to understand that you did inspect the parapet wall?

A I looked at it. I didn't do any physical touch to it.

Q You were on a ladder?

A Yes, and I looked up.

Q With your head below the level of the overhang?

A Yes.

Q Do you want the jury to understand that from that observation, you could tell us whether this parapet wall was eight inches thick or some other depth?

A Yes. A brick is eight inches long and it's four inches wide.

Q You don't know whether they were two lines of bricks that constituted this parapet or one line?

A No. I know it was an eight inch wall about three or four courses up and when I looked at the plan, I saw there were four courses.

Q But you didn't see that plan until this morning?

A Until this morning.

rk-1f-140 Leavin-Cross

Q Of what kind of material is the overhang constructed of?

A Aluminum.

THE COURT: How much longer are you going to be?

MR. AUSUBEL: Your Honor, this gentleman has to get back to Florida.

THE COURT: Try to finish.

Q Can you tell us the thickness of the aluminum?

A No.

Q Can you tell us what kind of a bracket was used to support the overhang?

A No.

Q If I heard you correctly, you said that this bracket was attached on the face of the building?

A Yes.

Q And that the top was bent over above the coping, at the top of the bracket?

A No. The plan shows that. The plan shows that the metal, corrugated metal which is at the top of the triangle, runs across the wall and down onto the face of the roof.

THE COURT: But that is not the bracket?

THE WITNESS: No. That is the triangular part.

THE COURT: In the direct testimony I think you were

rk-1f-141 Leavin-Cross 451

confused in terminology. You said the bracket hung over the wall.

THE WITNESS: The bracket extends beyond the wall. This is the street and the bracket is attached to the face of this wall and extends out 30 inches and down by this way here.

THE COURT: You misspoke in your direct testimony. You said the bracket went over the roof.

THE WITNESS: I really meant the face, the top goes over the wall and down. That is what the plan also shows.

MR. DUBROWSKI: May we approach the Bench, your Honor.

(Off-the-record discussion held at the sidebar)

BY MR. BRILL:

Q I would like to clear this up.

This structure, this overhang, is supported by something which is attached to the building, am I correct?

A When you say support, what do you mean? It's attached to the building. It's fastened, it's bolted.

Q How is it fastened to the building?

A By bolts.

THE COURT: The bracket is fastened to the building?

THE WITNESS: They drill a hole, then they insert a long screw, maybe a toggle, or whatever it was, and that

rk-1f-142 Leavin-Cross

holds that bracket to the face of the wall.

Q I am going to put my hand on the face of this jury partition. This represents the face of the building.

A Right.

Q And the ledge at the top of this structure is the coping, am I correct?

A The ledge?

Q The ledge on this table in front of the bench, represents the coping?

A It's a top of the building, yes.

Q The overhang extends out from the face of the building itself?

A Yes.

Q And it's perpendicular to the building, it extends out two and a half feet?

A Yes.

Q Something keep it in place?

A Yes.

Q What keeps it in place to the front of that building?

A Bolts.

THE COURT: The bolts are attached to what, a bracket?

THE WITNESS: Let's call it a fascia. It's a six inch piece of metal that has been first drilled to the face

rk-lf-143 Leavin-Cross 45

of the wall.

Q This six inch piece of metal, is that horizontal or vertical?

A It runs vertical.

Q Down the face of the wall?

A Yes.

Q And that is drilled into, it's held by means of rivets?

A Yes.

Q Something which is drilled into the wall?

A That is right.

Q Who puts those rivets into the wall?

A I think the workmen.

Q And they used equipment for that purpose?

A They use a drill, an electric drill or it may be a hand drill.

Q From your inspection, you could not tell how these fascia were riveted into place, could you?

A No, I could not.

Q You couldn't see from the position you were in?

A No.

Q You are in no position to tell us today how many rivets they put in or the kind of rivets they put into that, can you?

A No.

Q Was there anything other than the fascia which runs vertically across the face of the wall which would have lent support to that overhang that extended out 30 inches from that building?

A Well, the bracket.

Q Other than the brackets?

A No.

Q And those brackets were on the parapet wall or the face of the building?

A The face of the building.

Q They did not require any reinforcement from the coping itself, is that correct?

A No, it does not come into the coping.

MR. BRILL: No further questions.

CROSS EXAMINATION

BY MR. DUBROWSKI:

Q Mr. Leavin, I believe when you first took the stand, you testified that you were in business until 1962, then you became a consultant.

A I had my office for nearly 50 years in the same building. I did not go after any more heavy construction. My last contract there was with the United Nations, all the guard houses I built.

Q Isn't it a fact in 1959 you retired and after that you became a consultant?

A No.

Q When did you retire and become a consultant to attorneys?

A 1952.

Q And the major source of your income has been consultant to lawyers in personal injury actions like this?

A Not all, some of it.

Q A substantial amount of it?

A I would say not substantial.

Q Sir, just to clarify a few things.

You never got on this roof at all?

A Never.

Q And you have your report there, sir.

THE COURT: He has a copy in front of him.

Q From your report, sir, does it say who is supposed to put up this overhang? Who had the contract to do it?

A I am sorry, I don't hear that question.

THE COURT: Does the report say who the contractor was?

Q Who was the contractor to put up these overhangs?

A The porcelain company, I think.

Q These were the pictures that you took, right?

A I am going to say yes with a big hesitancy.

Q Those pictures, when I looked at them, I can't see any brick on them. It looks as though there is some kind of frontal thing on the whole side of the building.

A A what?

Q Like a plastic.

A The face of this building is a piece of metal.

Q The whole front?

A Porcelain.

Q That goes up to the roof?

A No, it doesn't.

Q Where does it stop?

A It stops about a foot below.

Q On this porcelain, can you tell whether or not there was brick behind it or could you at that time?

A Yes, I could. I am sure that this picture shows the vacant space underneath this fascia.

This is what I call a fascia, and that runs parallel right around the perimeter, and looking up there, I am positive that I saw no wall there at all. I am positive, I wrote it right then and there on a piece of paper and it is in my report and here is one that I am positive I saw up there.

Q Do you see where the brackets -- not the brackets, where the rivets or the screws for this bracket went into the wall?

A I did not notice it or make any inspection of the construction of the sign or its supports.

Q So you don't know whether they were screws or rivets?

A I don't know.

Q Sir, do you know the tension bearing strength of a one-half by one-quarter rivet?

A No.

Q This is something an engineer should know.

A I am not an engineer.

Q Are you an architect?

A I am not a mathematician. I never go in for any tensile strengths. I use the tension book.

Q Do you check on the text book --

A Any part of a building to be checked, that could be checked.

Q Did you on this one?

A I did not. There is some reference to the plan to the strength and the size and the thickness on that little plan and I am presuming that they followed it, the company followed that.

Q But you don't know whether Mr. McLean saw that plan, do you?

A I don't know.

Q You don't know who saw it?

A I don't know.

Q To Mr. Furey you made mention of the fact, I think your words were, "The men wouldn't dare put their entire weight on this overhang and if they did, it would be foolish."

A Foolish.

Q If instead of kneeling on it one of them stood on it, would it be foolish?

A It would be foolish.

Q If one stood on it, would it be reckless?

A It would be foolish.

Q It would be stupid?

A They wouldn't do it.

THE COURT: Enough of that.

Q Sir, I am trying to reconstruct in my mind how this thing could have happened --

MR. AUSUBEL: Your Honor, it might be interesting what he is trying to do in his mind but that is not a proper question.

THE COURT: Technically it is not a proper question.

rk-1f-149 Leavin-Cross 457

Q Mr. Leavin, if in drilling the brackets in, the men put a rivet in the mortar between the coping and the top brick and put on the fascia and the aluminum roof which went over the coping, then either knelt or stood on that aluminum thing, that weight would be enough then to bring down the coping all the way down?

A You are making up a make-believe picture of a mechanic on the job. I couldn't answer that at all.

THE COURT: The question is: you don't know where they put the rivets.

THE WITNESS: I don't know. How could anybody tell you where a man may drill a hole?

THE COURT: You have expressed an opinion as to how this happened. He is asking you a hypothetical question and asking you whether you can take into consideration that possibility.

THE WITNESS: I couldn't take that into consideration.

Q Sir, have you seen this picture, Plaintiffs' Exhibit 14G put into evidence?

A Yes.

Q Does that show brackets against the building?

A I can only see one on the corner.

Q Does it show what they call the vertical plate?

A You better point it out to me.

rk-1f-150 Leavin-Cross

Q What do you call these things, these things right here?

A This is what I called before fascia. These are metal, pressed aluminum metal into the form of a little channel and they are perhaps about ten courses long and they are placed against the face of this building and bolted in place.

Q Those two things are vertical?

A Yes.

Q And you say they are bolted into the building?

A I don't know how. They are fastened.

Q Are they fastened to the building?

A They are fastened to the building.

Q You don't know how they are fastened to the building?

A No.

Q And they are remaining there on that picture?

A They are shown in this picture.

Q And as you said before, the top of the brick or the coping is missing?

A The top of the wall is missing.

Q But those vertical line things are not missing?

A Don't call them verticals. Call them fascias. There is only one bracket in place here. This is the only one that is seen. These other ones are empty in place. They may

be for another purpose.

THE COURT: In other words, a bracket like this one was originally out here?

THE WITNESS: Yes, that is it,your Honor.

MR. DUBROWKSI: I think I have nothing further. Can you bear with me, your Honor.

Q Mr. Leavin, I gather that this overhang, the aluminum overhang that is outside the building was not made to be knelt on --

THE COURT: We have been all through that.

MR. DUBROWSKI: That is all.

CROSS EXAMINATION

BY MR. HAUT:

Q Mr. Leavin, under the custom and practice prevailing in New York at the time, would there have been any duty on workmen such as the plaintiffs in this case or United Porcelain, their employer, to make any inspection of the parapet or of the coping for structural defects or weaknesses?

A No, sir.

REDIRECT EXAMINATION

BY MR. AUSUBEL:

Q Would you have an opinion as to whether workmen such as Mr. McLean and Mr. Linfante would have a right to rely upon the security of the building and that includes the

place where they were working at in doing their work?

A Yes.

MR. BRILL: Objection.

THE COURT: Overruled.

He said that on his direct.

MR. AUSUBEL: No other questions.

CROSS EXAMINATION

BY MR. FUREY:

Q It would be a foolish workman if he didn't inspect his own work area, wouldn't he?

MR. AUSUBEL: This is now going into --

THE COURT: It is the same question you just asked.

A He wouldn't have any reason to inspect the wall. He was only involved in the brick wall, placing the sign on the brick wall.

Q Your answer then, Mr. Leavin, he would be perfectly justified in not inspecting his own work area?

A He would not be justified in inspecting that brick wall.

Q Even if he was going to hang something on it and stand on it?

A You are drawing it out. I don't know how to answer that.

Q Mr. Leavin, are you familiar with drive rivets?

rk-1f-153 Leavin-Cross

A In a way.

Q Do you know what they are?

A Maybe so.

Q Can you tell us what they are?

A I don't know as of this minute.

Q Are you familiar with the type of aluminum rivet used on a masonry wall which is attached by driving it home?

A Yes, I have seen that done.

Q That is all, you have just seen it?

A I never made a study of that. That is not my business.

Q Have you ever been involved in buildings --

A I have seen it many times in structures, but I am not a mechanic.

Q Let me ask you this. If somebody hammers this carelessly and doesn't hammer it all the way home, is it likely to pull out?

A I don't know.

MR. FUREY: That is all.

THE COURT: Ten o'clock tomorrow morning, ladies and gentlemen.

(Witness Excused)

(Adjourned to 10:00 A.M., 2/14/74.)

rk-1f-154 479 a

JAMES V. MC LEAN, et al.
vs.
L.P.W. REALTY COMPANY, et al.

GULF OIL CORPORATION
vs.
BEAMAN CORPORATION, et al.

New York, February 14, 1974
10:20 A.M.

(Trial resumed)

(In open court - jury present)

THE COURT: Do you want to proceed with your plaintiff?

MR. AUSUBEL: Yes, your Honor.

Mr. McLean, take the stand, please.

J A M E S V. M C L E A N, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. AUSUBEL:

Q I have to refresh myself each time where I left off so if I cover some areas I previously went over, it will be okay.

At any time before this roof caved in, to use your language, were you standing on that overhang?

A No.

Q Was Mr. Linfante standing on that overhang?

A No.

Q You indicated you had used thse rivets that were furnished by Beaman in putting in the overhang as well as those brackets and the triangle parts, do you recall that, sir?

A Yes.

Q Does Exhibit 14G fairly and accurately represent the method by which you put in the rivets on the portion that remained up?

A Yes, that is the same. I would say it is correct.

THE COURT: May I see it, please?

MR. AUSUBEL: Yes, your Honor.

Q Was the same procedure followed in putting in the overhang on the portion that eventually came down?

A The same thing.

Q Was that the way you had put on these overhangs on the 75 prior occasions before this?

A Yes, sir.

Q You indicated yesterday that you were kneeling just before the roof caved in, do you recall that?

A Yes.

Q Did you adapt that same procedure on the 75 prior occasions when you put up these overhangs and eventually got to putting in perimeter lighting by kneeling?

A Always the same way.

rk-1f-156 McLean-Direct 466

Q On these prior occasions when you employed those methods, did you have any difficulty in sustaining your weight on the roof and overhang?

MR. FUREY: Objection. It is leading and suggestive.

THE COURT: You are kind of testifying for the witness and the jury would rather hear him than you.

Q When you did it on these prior occasions, describe it.

A We did the same procedure on every job. When we completed the overhang, with the exception of the lights, we would get -- we would put the lights along the decking, then put our board down and put the light out toward the edge, then we would kneel down on the coping part here and just lean out with one hand here and lift it up and put it on. I would be on one end of it and Linfante, or whoever was working would be on the other end.

Q Is this the procedure you adopted before the collapse?

A Yes, the same thing.

Q I think we had gotten to the point that you indicated you had been removed from the ice machine in some kind of a basket, is that correct?

A Yes, they brought a basket. It is a long basket, about eight foot long, six foot long.

Q Did you feel pain in any part of your body?

A Oh, yes. I had plenty of pain.

Q In what part of your body did you feel pain?

A This right side.

Q Before this accident, had you ever had any trouble with your right leg?

A Never.

Q Did you ever have any trouble working from roofs or climbing up ladders before this accident?

A No, sir.

C Ithink you had indicated you had been working since you were quite young.

MR. FUREY: Your Honor, I don't like to keep objecting but this is a most improper way of proceeding.

MR. AUSUBEL: This was brought out last Friday.

MR. FUREY: Then why waste time repeating it?

THE COURT: Try to do it another way.

All counsel like to sum up during the examination of a witness. The other side will do it, too.

Q Where were you taken to after the accident?

A The Harlem Hospital.

Q How were you taken to the hospital?

A In one of those little, they are supposed to be ambulances, I guess. It didn't look like an ambulance but it

was supposed to be.

Q You were confined to the hospital for the first time for about how long, sir?

A About eighteen days.

Q During that time, were you confined to bed?

A Yes.

THE COURT: The whole time?

THE WITNESS: They came in and fitted me with crutches one day, I don't remember when, and then they would let you up. They let me walk around later on but not in the beginning. I don't know what day that was.

Q How did you feel while you were in the hospital during those eighteen days?

A Not good.

Q Tell us what was troubling you.

A My leg, the cut, that was still new. It is gone now, but at the time it was a nice tear or gash on my left leg, and I suppose you would call it shock from the accident.

Q Did they operate on you in the hospital?

A Yes.

Q Tell us about that.

A The first time they took me up to the operating room, it was quite a trip because they take you down into the cellar first, then along into another building and then

up in an elevator into another building. It is a nice ride. When we got there, I could hear them inside saying we don't have his blood.

See, I have an AB negative blood. It is quite rare, and they were told about it and they said don't worry, we have it. Somebody downstairs, you know, but when I got up there, they had to take me down again, and the following day they brought me up and gave me the operation, they had the blood then. That was the second day, I believe, after the accident.

Q Do you recall how long you were in the operating room?

A I don't know nothing about that.

Q You were out under general anesthesia?

A I didn't know anything until I woke up in the bed.

THE COURT: Back in your own bed?

THE WITNESS: It was a ward. There were about 28 beds in that room. That is how I woke up.

Q How did you feel after the operation?

A Not good. Sick.

Q Tell me what was troubling you.

A The pain of the operation. The left leg with the gash, and the bruise from inside. You don't just get a cut without the hurt go inside, or the leg. It doesn't go

away because somebody did something to it. There is still pain there.

THE COURT: Tell the jury how much pain.

THE WITNESS: I don't know how you estimate pain. It is very discomforting I would say. It was very uncomfortable. If you had a toothache it would bother you and be painful, but the intensity of the pain, I couldn't describe.

Q Did you wife come to see you at the hospital?

A Yes.

Q How often did she come?

A She came twice a day, in the afternoon and evening.

Q After the operation, what did they do for you in the hospital?

A They just examined you everyday. They checked you. Dr. Shelton, I believe, he would make his rounds everyday with a group of doctors and they would check you to see how you were.

Q Did they do something to that gash on your left leg?

A Yes. The put stitches or something in it, I don't know. They did that the first night I was in the hospital. They did that in the evening, or nighttime, because we didn't get upstairs into the hospital until the night. I was hurt about 2:30, then we were brought into the hospital and just

laid there for hours. It was very hot and I believe there was a doctors' strike, too, at the time up in Harlem, so it was crowded with people, patients all over the place, so in the evening sometime, I was up on some other floor and that is when they came in and did something to the leg, stitched it up or something, then in the morning they took me down and put me in a ward and then as I said before, they went up for an operation which didn't happen, then they brought me down again and the following day I went up.

Q There was some reference made to, that you were put in traction. Do you remember that, sir?

A Vaguely. I remember a little thing pulling on the foot, something like that for awhile.

THE COURT: Before the operation, is that correct?

THE WITNESS: No, I don't think so. Before the operation they had me up in that room. I don't remember what they did outside of fixing up the gash in the other leg.

Q How was your sleep in the hospital?

A Very fitful. I don't even remember if they gave me medication over there.

THE COURT: You don't remember anything?

THE WITNESS: I don't remember that far back their coming around giving me anything. I don't remember any needles. Maybe they gave me a pill or something, I don't

remember that.

Q First of all, how did you get home from the hospital?

A My wife picked me up and drove me home.

Q Your home is in New Jersey?

A Fairlawn, New Jersey.

Q After you came home, did you feel any pain in any part of your body?

A Yes. I was up and around with crutches and I couldn't put the foot down.

Q Which foot?

A The right leg. I had to keep the foot on the right leg off the ground and use the crutches and I would sit outside in a chair. We had a hospital chair, a wheelchair, and I also had a hospital bed in my house for that, to keep my feet, my foot up in the air.

Q Then what happened after you came home?

A I started to feel something wrong with my leg but I didn't know what it was, so I mentioned it to my wife but let it go maybe two or three days, then they finally called up Shelton and told him that I was complaining about my leg having a pain in it so he decided to look at it. He told her to bring me over. We went over and he looked at it and he sent me right upstairs again and he said I had a blood clot in my leg and he told me to get into bed and not get out

of it, stay there without moving and that was painful.

Q That was the right leg?

A Yes, in back of the knee.

Q How long were you in the hospital a second time, sir?

A I think about six days.

Q Incidentally, did your wife take care of you while you were at home between the two hospitalizations?

A Yes.

Q How did you get home from the hospital the second time?

A My wife picked me up again.

Q How long were you out of work after this accident before you first were able to go back to work?

MR. DUBROWSKI: Objection.

THE COURT: How long was he out of work?

MR. DUBROWSKI: Before he was able to go back to work.

THE COURT: Haven't you stipulated on that?

MR. DUBROWSKI: No.

THE COURT: How long before you did go to work?

THE WITNESS: I was home fourteen months, then I went back September 5, 1967.

Q During that fourteen-month period of time following

the accident, just tell us how you were managing.

A How I managed?

Q Yes.

A I didn't work. My wife had a part time job.

Q How did you manage physically to get around?

A I was on crutches most of that time and that is how I had to get around. I had to go for a stocking, a very heavy stocking which I have on now. It is a surgical stocking. It comes up to here (indicating) and I had to get a belt, because of the swelling in the leg, and I would have to put that on as soon as I get up in the morning; otherwise, it would have a tendency to swell before you put it on, and I had to wear that.

Q Did you have pain in your leg during that period of time?

A I have cramps. Every so often I will get a cramp just by pulling my leg up this way to put the stocking on. I get it sometimes when I am in bed if I sort of just stretch, I have a tendency sometimes to go like that, to stretch my legs out, and I will get it in here all the way up to almost to the hip. Of course, I am talking about the inside, and that will send me out of bed falling all around the room when I get that, and that is painful because you can't seem to get rid of it.

Q You went back to work. Who did you go back to work for on September 5, 1967?

A United Porcelain.

Q Did they pay your salary during that fourteen month period?

A No.

Q After you went back to work for United Porcelain, what kind of work did you do for them?

A It was the same type of work but instead of a two-man time, it was four men. I was with three other men, three or four men and it was the same type of work I would do up on a roof and sort the stuff, separate, hand it to them.

In other words, they gave me an easier job.

THE COURT: The same money?

THE WITNESS: The pay was the same but they gave me a little break on account of the break.

Q I am not going to go through year by year or month by month since 1967 to date. Why don't you tell us as of this very moment, what problems, if any, you had with respect to your right leg?

A It is all discolored and it has that swelling which is quite visible if I was to take my pants leg up and it is very itchy. The skin, there is something wrong with the circulation and I get the cramps.

It is also a little funny sometime on the hip here. I find myself rubbing it once in awhile to get a little ting -- what do you call it, twinge in there.

Q Have you had these problems since this accident to date?

A Yes.

Q Did you ever have any problems, circulatory problems or phlebitis problems in your right leg before this accident?

A Never.

Q Did you do any work about your house before this accident?

A I did all the work before the accident.

Q What about since the accident?

A I slowed up quite a bit. I guess I don't have as much work to do on it. I did quite a bit before that. Small work, you know.

MR. AUSUBEL: You may inquire.

MR. ADELMAN: No cross, your Honor.

MR. FUREY: Was the original examination before trial in this case signed in this case?

MR. AUSUBEL: I don't have the original.

CROSS EXAMINATION

BY MR. FUREY:

Q Mr. McLean, when you were in the hospital, did you have some problem about a cancelled operation?

A Yes. As I stated before, one day after I was brought in.

Q Did you and your wife tell them you were going to sue the hospital?

MR. AUSUBEL: Your Honor, I don't know how this is germane to anything in the case.

THE COURT: It has nothing to do with the case.

A I didn't say it and I don't believe my wife said it.

MR. FUREY: I would like to read from this.

MR. AUSUBEL: I don't see how this has the slightest relationship to any issue in the case.

THE COURT: I can't quite see it.

MR. FUREY: Credibility.

THE COURT: I don't see what it has to do with the credibility.

MR. FUREY: There is talk here that he has been in a lot of pain. If he was threatening to sue the hospital --

THE COURT: It seems to me it would increase the amount of pain.

It is not relevant. Proceed.

Q During the time you were in the hospital, Mr. McLean,

were you in pain after your operation?

A Yes, I had some pain.

Q Did you tell the nurses about it when you had this pain?

A They asked you how you feel and you tell them.

Q What did you tell them?

A You tell them how you feel.

Q What did you tell the nurses during this period of time from your operation until the time of your discharge?

A If you have a pain, you tell them you have a pain here or there and you tell the doctor, too.

Q Did you tell the nurses?

A They don't come around as much as the doctor. The doctor is the one that usually gives you -- he is the one that asks how you feel and he checks your chart.

Q Didn't you just tell us the nurses ask you how you feel?

A Yes, sometimes.

Q When the nurses ask you during this period of time, what did you tell them?

A I told them how I felt.

Q What did you tell them?

A I don't remember way back if I said my foot hurt or my leg hurt.

Q Do you remember whether or not you were in pain during this period?

A Of course I was.

Q When the nurses asked you about it, did you or did you not tell them you were in pain?

A Yes, I would tell them my leg.

Q And you complained of pain in your leg?

A Yes.

Q Did you do that everyday until you were discharged or only for some period of time?

A I wouldn't tell them everyday.

Q Did it pain you everyday?

A Nothing pains you everyday.

Q How often did you feel pain in your leg during this period of time between your operation and the time you left the hospital?

A I wouldn't remember. Maybe the hospital report would show you if I complained about it everyday.

Q Don't you know whether you complained or not?

A This is eight years ago. You want me to say I was holler'ng everyday.

Q If you don't remember whether or not you had pain, just tell us.

A I did have it but I didn't have it everyday.

Q Will you tell us whether or not you remember whether you told the nurses about it when they asked you?

A I would tell the nurses. I couldn't tell anybody else. I would have to speak to a nurse.

Q Do you recall, sir, whether or not you told the nurses that you had pain during this period?

A I told you before, yes.

Q How often did they tell you during this period?

A I don't remember that. I would say maybe everyday, every other day. I don't remember.

Q If on July 1, 1966, the nurse's notes, "No complaints offered."

Would you say that was accurate, as of July 1, 1966?

A I wouldn't know about that now, July 1st.

Q How about June 30th?

A They say no complaints?

Q It says no complaints. Offered no complaints of pain.

A I could say maybe they didn't come over to ask me anything that day, then.

Q Do you remember whether or not you were complaining of pain to the nurses during this period?

A I would have to have pain but I don't know if I am

complaining exactly to them because there are only a few nurses around the hospital in the 28-ward room.

Q If you didn't tell the nurses, just tell us that. Did you or did you not tell them?

A You asked me if I had pain and I had pain but you want to know if I told the nurses.

Q Right.

A Would you want to know her name, too?

Q I just want to know what you told them.

THE COURT: He said he doesn't remember.

Q July 2, 1966, no specific complaints offered. Is that in line with your recollection, sir?

A I wouldn't remember.

Q July 8, 1966, no complaints offered. Is that in accordance with your recollection, sir?

A This is for everyday?

Q I am talking about the nurse's note of July 8, 1966, in which it says "No complaint offered." Is that accurate or not accurate?

A Why would I remember July 8th? Ask me about July 7th.

Q Did you complain on July 7th?

A I don't know.

THE COURT: Just answer his questions. Don't worry

about why he asked the questions. Just answer him.

Q Is this accurate that you had no complaints on July 8th?

A I can't remember.

Q July 14, 1966. "States he feels all right."

Do you recall making that statement to any nurse around that time?

A No.

Q Did you feel all right at that time?

A If I said it, I probably did.

Q Then you weren't in pain at that time?

A If I said that, I wasn't in pain.

Q Do you recall whether or not you were in pain at any time during this period?

A You mean while I was in the hospital?

Q Yes.

A I would have to have pain.

Q I didn't ask you whether you of course had to have it, did you have it?

A I remember having pain while I was in the hospital, but what dates -- I was in eighteen days.

Q And you had pain for a time after the operation?

A I don't have a continuous pain.

Q How about your second admission, were you in pain

when you went back in for this phlebitis condition of your leg?

A Yes, I had pain.

Q Did you tell the nurses about this pain?

A I believe they were notified of it.

Q What?

A I believe they knew about the pain. You want me to say that I had pain and I told the nurse about it?

Q Didn't you tell us just a few minutes ago that when you were in the hospital, the nurses would customarily come around and say how did you feel?

A Yes, they came around sometime and asked you how you felt.

Q On the second admission, the second time you were in the hospital, around the end of July, when they came around and said, "How do you feel?" did you say you had pain?

A I have to explain that a different way.

Everyday I had a doctor in the morning come to check me with this blood clot. They would take blood, have it analyzed, whatever they do with it, come back and give you a blood thinner or whatever it was for your condition, so they were on top of me, I didn't have to tell them anything. They know a blood clot is painful.

Q Sir, did you tell us earlier that the nurses would

customarily come to you and say, "How do you feel?"

A Sometimes.

Q They did it regularly, didn't they, Mr. McLean? You had nurses around the clock, didn't you, three shifts of nurses?

A Yes, but you didn't have that many nurses in that ward.

Q On the sometimes, on the second admission when the nurses came to you and asked you how did you feel, did you tell them about the pain you were suffering?

A If they asked me I would tell them. I don't know that they asked me at that time. You are talking about my second admission?

Q Yes.

A This is a doctor that walks around the hospital, this doctor's care I was under. He was the intern or whatever, and he would come in early in the morning and I am talking about five or six o'clock.

Q We will get to the doctors. Tell us yes or no, did you tell the nurses you had pain during this admission?

A Yes, I would say I would have had to but I just don't remember.

THE COURT: How can he remember what he told the nurses in 1968?

MR. FUREY: He testified to it on direct.

THE COURT: But how can he remember what he told the nurses?

MR. FUREY: I think the jury should determine on this man's credibility whether they should accept his correction of claim.

THE COURT: But you have established that he doesn't remember, why continue?

Q July 28, 1966. "Appears comfortable." Is that in accord with your conversation?

THE COURT: Get on with something else. He told you he doesn't remember each day. You could read those dates if you want.

MR. FUREY: Respectfully except.

Q Do you remember the part-time job you worked at after your operation?

A Part-time job?

Q Yes.

A I went to work for United Porcelain if that is what you are referring to.

Q When did you go to work for United Porcelain?

A September 5th.

Q United Porcelain?

A Yes.

Q Didn't you say when you were asked by Mr. Ausubel, how you managed after this operation, you said you took a part-time job?

MR. AUSUBEL: He said his wife was working at a part-time job.

MR. FUREY: Excuse me.

Q And you didn't do any work during that period of time?

A No, sir.

Q What did you do with your time?

A The same as I am doing right now, I am not working and I am around the house and I wash the dishes and take care of the house outside and inside, walking around, letting the dog out.

Q Did you do that during the fourteen months after your accident?

A No.

Q Didn't you just say you were doing the same thing?

A I was sitting around the house.

Q Did you go out of the house at all?

A Oh, yes.

Q Where did you go?

A I would walk around.

Q Where to?

A Around the house, around the block, outside in the yard, sit around.

Q Did you do any gardening?

A We don't have a garden.

Q Did you do any work around the house, fix things up?

A Raking up the lawn or the leaves, or whatever.

Q How long did you use crutches after you got out of the house, Mr. McLean?

A Until I was released by Dr. Willner, I don't remember that date. I think Dr. Willner released me.

Q You weren't using crutches when you went back to work, were you?

A No.

Q How long before you went back to work did you put aside the crutches?

A I said fourteen months I was home.

Q How long before you went back to work did you put aside the crutches?

A I don't remember, unless you have Dr. Willner's report there someplace.

Q Do you remember, sir, whether you used the crutches for two weeks or two months or a year or what?

A I used them more than that, I believe.

Q More than what?

A You said two weeks.

THE COURT: Two weeks, two months or a year, pick one out of it.

THE WITNESS: And if I am wrong, I look like I don't know what I am talking about. Somebody must have a record from Dr. Willner.

THE COURT: He is asking for your recollection.

A Then I don't remember.

Q You saw Dr. Burton at the request of your lawyers, is that right?

A Yes.

Q Before you saw Dr. Burton, when was the last time you saw any doctor for treatment for this accident?

A I don't remember that either.

Q You say you were released by Dr. Willner. Was he the last doctor you saw for this accident?

A I believe so.

Q Did he release you before you went back to work?

A Yes.

Q You haven't seen any other doctors since?

A I don't recall seeing another doctor for that.

Q And you don't recall how long before you went back to work Dr. Willner released you?

A No, I wouldn't, but when he released me, I would have to call up United Porcelain and tell them that I am available for work.

Q Did you go right to work when you called them up?

A I think it was maybe a week or so, because it was right after Labor Day that I went to work.

Q Mr. McLean, with regard to this gas station, United Porcelain undertook a job to put on the overhang plus the porcelain on the walls.

A Yes.

Q Did you put the porcelain on the walls?

A No.

Q Who did?

A I have no idea.

Q Was it done after you started with the overhang or before?

A After.

Q At the time you were putting up the overhang, there were bare brick walls all the way around?

A Yes, as far as I know.

Q Wh gave you your instructions to go out on this particular job?

A I would get them from United Porcelain.

Q Who?

A I think the foreman. They had a foreman, at the time, I believe.

Q Who was the foreman?

A I think George Oger. Either him or Sol. I don't remember whether he was the foreman at that time or not. Maybe it was Sol.

Q Sol was Sol Casso, the principal in United Porcelain?

A Yes.

Q And you said you did about 75 of these jobs?

A Yes.

Q So it was sometime before you did your first one?

A I don't understand.

Q It is a bad question.

How long were you a sheet metal worker before you did your first gas station job like this?

A 1950.

Q When did you do your first gas station job?

A About two years previous to that. It would be '64 sometime.

Q And you were hired by Mr. Casso, he interviewed you and put you on United Porcelain?

A Yes.

Q Before you went out on the first job, how did you find out what you were supposed to do?

A He sent us with a crew he already had.

Q Who was that --

A To break us in.

Q Who was that crew, who was in that crew?

A The foreman's name was Harry but the last name I don't know. Casso would have it. Then he had another fellow from New York someplace.

Q How many men were in this other crew?

A I think they had two.

Q And one of these two men was Harry the foreman?

A Yes.

THE COURT: Two besides you?

THE WITNESS: Yes. I was sent down with another fellow, not Linfante. I was sent down with another fellow from the union at the time.

THE COURT: Two new fellows went out?

THE WITNESS: Two of us were going out to be broken in, then we would go out on our own.

THE COURT: How many were in the crew that you joined?

THE WITNESS: Just two. Us two made the four.

THE COURT: And one of those two was a foreman?

THE WITNESS: Yes. He would go with new men sometimes.

Q Did the crew usually have a foreman?

A That was the only one he had as a foreman at that time. When I went in there, he was a new fellow, he didn't even belong to the union.

Q When Harry the foreman showed you how this work was to be done, did he tell you to stand on the overhang to put the lights in?

A No.

Q Did he tell you not to stand on the overhang?

A They showed us how to do it, to kneel down on that and put them in the way I told you before.

Q Did he tell you to kneel on the overhang to put the lights on?

A You don't kneel. You kneel on the back part toward the roof where the coping is.

Q Did he tell you not to put weight on the overhang when you were putting the lights in or did he tell you not to?

A He didn't say anything about that.

Q When he showed you how to do it, the first time you ever saw how these lights were installed, did you do it yourself under directions or did somebody do it in front of you?

A They did it.

Q When they did it, these fellows that did it, did the put weight on the overhang?

A They were doing it the same way we did it.

Q When they demonstrated for you, did they put their weight on the overhang when they were putting the lights on?

A How far out do you want me to say they were on the overhang?

THE COURT: It is not a question of what he wants you to say. It is a question of what happened.

Q How far out on the overhang were they?

A They were about fifteen inches out.

Q Were their knees on the decking of the overhang?

A They had a board down, a piece of firring, because of the corrugation decking.

Q At that point were their knees on the overhang? Is there entire weight being supported by the overhang at that point?

A No.

Q But you say their knees were about fifteen inches out from the wall?

A Yes, that is right, and underneath that is your wall or your coping.

Q At fifteen inches out from the wall, sir, their feet would be about even with the top of the wall --

MR. HAUT: I will object to this line of questioning. The relevance of it has expired. The question is what was the procedure followed on this occasion by these men and was it a proper procedure.

I submit this is the one issue in this lawsuit, not what other people did at other times.

THE COURT: You are talking about United Porcelain?

MR. FUREY: I am asking him about the instruction he got.

THE COURT: It seems to me it is relevant.

Q You said when they did this, their knees were fifteen inches out from the end of the wall, is that right?

A Not the end of the wall.

Q How wide was the overhang?

A You mean out toward the street?

Q How wide was the overhang?

A That is 40 inches.

Q The entire overhang is 40 inches?

A Right.

Q And it goes out about 30 inches from the wall?

A Approximately that.

Q When you said halfway out on the overhang, your knees are about fifteen inches from the wall?

A No, fifteen inches from the back part. From the

roof side.

Q And this is the way you were instructed to do it, right?

A Yes.

Q Did Mr. Casso and United Porcelain own scaffolding?

MR. HAUT: I object to the question. There is no relevance to this lawsuit.

MR. AUSUBEL: I join in it.

THE COURT: It is relevant to the claim over.

MR. HAUT: This is not part of plaintiffs' claim. The claim over can only be predicated on liability of Gulf and if it is no part of the plaintiffs' claim against Gulf, I submit it is no part of the claim over.

THE COURT: He can answer.

Q Did United Porcelain own scaffolding?

A I don't know. We only worked from "A" ladders.

Q And this was the material that you were instructed to use by United Porcelain, the "A" ladders and the plank?

A Yes, it was delivered by them to the job site.

Q According to your understanding what United Porcelain wanted you to do, that was the material, the equipment you were supposed to use on the job, is that right?

A That is right.

Q Sir, on this particular job, the job in which the

accident occurred, when you went to the job, did you set up the "A" ladders?

A Yes, when I went to put the wall brackets on.

Q Which side did you start on, as you face the gas station?

A On the right side.

Q How big were these "A" ladders?

A About eight foot, with an extension of six foot.

Q Before you got to that, did you put your material up on the roof?

A Yes.

Q Where did you set up the ladders to do that?

A Against the wall, on the roof.

Q In the front, the sides or what?

A On the front.

Q To the right or to the left of the gas station as you are facing it?

A Wherever the what do you call it was. Wherever they had all their material, by whatever bay. I believe it was on the right side.

Q Did you use two "A" ladders with a plank at that time?

A No.

Q You just leaned the ladders up against the wall?

A First you opened it up. You shoot your extension up, through the bar over to hold it in place, let it come backto that, then push it together, lean it up against the building and you walk up.

Q You are using it in the same way as if you were using an extension ladder?

A Just using a regular ladder.

Q You used an extension ladder?

A It was the "A" ladder folded up.

Q Did you and Mr. Linfante bring all the materials up yourselves?

A Yes.

Q Will you tell us how you did it?

A One goes up on the roof and we had a line with a little hook on it. We would drop it down and I would bring it or he would bring out, whoever was on that particular part of the job, would send up all the pieces of aluminum and everything that was in there would go up.

Q Did you carry anything up on your shoulder?

A Yes.

Q What did you carry up on your shoulder?

A The lights would be carried up.

Q How much did the lights weigh?

A I would say about 60, 70 pounds.

498

Q How long were the lights, sir?

A About eight foot.

Q You put it on top of your shoulder, then go up this way, one hand on the ladder, straight up?

A Partly up, then tip it, then push it up, then he would grab it up there and they would walk up with it then, give it a little more push.

Q Did you have any difficulty in handling these lights on the ladder?

A Not that way. Not on that ladder.

Q When you got to the point where you were putting the brackets on the walls, you set up your two "A" ladders in a different fashion. At that point they would be like the actual "A" with a piece going up in the middle?

A Yes.

Q Then you have a plank there that would put between the ladders?

A That is right.

Q Then you took your electric drill or drills?

A Yes.

Q Whose drill was that?

A United Porcelain's. It is a hammer drill.

Q What do you mean by a hammer drill?

A It has fluctuating, like a little thing inside so

you don't have to push it. It hammers as it is going on. As it is turning, it is popping like that.

Q Is it electric or pneumatic?

A Electric.

Q Did that have a masonry drill bit on the end of it?

A Quarter inch Carboloy bit.

Q Whose drill bit was that?

A United Porcelain.

Q Did you check the drill bits before you started to use them?

A You are always given new ones before you start every job.

Q Did you check it?

A We could see it as we put it in.

Q Everything you do, you always check the area out?

A We look at where we are walking, what we are doing.

MR. FUREY: May I see the photographs?

MR. AUSUBEL: Here.

MR. FUREY: Do you have any others?

MR. AUSUBEL: These are the only four in evidence. You objected to the rest of them.

Q Showing you Plaintiffs' Exhibit 14F, would you take a look at that for a second, sir.

With regard to the first piece that was attached to the wall, Mr. McLean, do we see in that picture a vertical strip attached to the bricks?

A Yes.

Q What do you call that?

A We call that a wall bracket.

Q Would you put WB next to that so we can identify it?

A Anyone?

Q Anyone, sir.

A Yes.

Q These wall brackets were attached by drive rivets, is that right?

A That is right.

Q Would you tell us, sir, what a drive rivet is, sir?

A It is a quarter inch aluminum rivet, approximately one and a half inches long with a pin, a steel pin or a stainless steel pin in the center. When you drill your hole to a depth of one and a half inches, then you put that, just tap it in, then you hit the pin and it spreads the back out, the front part of the pin.

Q If you don't hit it all the way in, sir, it wouldn't be tight?

A It is in when you put it in the hole.

Q You put it in the hole and you put it in with your finger?

A No, we used the claw part of the hammer.

Q To put it in?

A To miss the pin. The pin is in the other side of the rivet. By using the other side of the hammer, you hit the face of it and if it wouldn't go in far enough, you take it out and drill a little more. Usually we were pretty good at getting it in.

Q If the hole isn't deep enough, you wouldn't be able to fasten the rivet tight?

A It would be sticking out.

Q Even if the hole is deep enough and you didn't hit the pin properly, it wouldn't be able to grab as well?

A You can't help missing it. When that goes through, it spreads the back open.

Q When you or your partner were on a job, you would sometime forget hitting the pin?

A You can't forget hitting the pin. You would put it in and as a result, what we do when we are working on this kind of job, is that one is drilling because it is a big drill and it is heavy, so you drill and your partner is standing there. As sson as you drill it, he puts the rivet in and hits it, one or the other, meaning the men. I

might be doing it or he might be doing it.

Q These wall brackets were not attached to the coping, is that right?

A They are not attached to the coping.

Q After you got the wall brackets in, you got a triangular bracket that you attached to the wall brackets, right?

A Yes.

THE COURT: That strip of metal is called a wall bracket?

THE WITNESS: It is directly on the wall and that is the only purpose. It goes straight up.

THE COURT: Is that what the expert called a fascia?

MR. FUREY: No, that is something different.

Q The triangular bracket is then attached to the wall bracket?

A It is attached to the wall bracket.

Q How do you fasten the traingular bracket to the wall bracket?

A There is a one inch space going out that way. That is not a flat bracket, that wall bracket. It is an inch wide by about three or four inches.

Q When you put the triangular bracket on, you don't drill any new holes, is that right?

A Yes.

Q You drill any holes for the triangular bracket?

A We drill new holes right through that wall bracket.

Q You don't drill any new masonry holes at this point?

A No masonry holes.

Q You drill a hole in the wall bracket and the weight of the bracket is supported by the wall bracket?

A That is true.

THE COURT: The wall bracket attaches to the masonry and the triangular bracket attaches to the wall bracket?

THE WITNESS: Yes.

I don't know that you can see it on the picture --

Q Let me show you Plaintiffs' Exhibit 14D and perhaps you could mark a triangular bracket with a "TB".

A Yes. It is hard to write in the little area where it is.

Q Draw an arrow to it with the letters "TB".

THE COURT: Is it possible to get these pictures blown up?

MR. AUSUBEL: I will make an effort to have a negative made of the positive and then have it blown up.

Q And this triangular bracket that is in place then, Mr. McLean, that goes up in front of the coping, isn't that right?

A Yes.

Q It is not attached to bear any weight on the coping, it is attached to the wall bracket?

A If we hit a spot like that, we can put a rivet right in there.

Q You didn't do it in this case, did you?

A Yes.

THE COURT: I don't think that was clear. Rivet right in where?

THE WITNESS: Right in the coping. If it has a coping there and the angle bracket comes up, it has to go a little past the top of it because everything is going to run off that into the roof, so it has to be up higher than the coping, and then you can put one rivet there and other rivets are in the wall bracket, but we utilize that, too, at times.

THE COURT: You utilize the coping?

THE WITNESS: Yes.

Q Didn't you tell us a few minutes ago that all the weight from the triangular brackets was borne by the wall bracket?

A That is what you asked me and I said yes.

Q Is it true?

A If you put a rivet in there, you have that working with the wall bracket.

Q When you told me a minute ago that all of the weight was borne by the wall bracket, is that true or is it incorrect?

A We do put it in once in awhile.

MR. FUREY: May we have a direction to the witness to answer the question?

THE COURT: The question he wants to know, is it true all the weight is borne by the wall bracket? If other weight is borne by something other than the wall bracket, then it is not true.

A I have to say then it is not true.

Q Do you remember appearing for an examination before trial in June of 1970 -- do you think your recollection was better in 1970 than it is now?

A I remember going --

Q Do you think your recollection of these events is better now or in 1970?

A I wouldn't know.

Q In any event, you remember coming down for an examination before trial at your lawyer's office, and Mr. Ausubel was there?

A Yes.

Q And you discussed the case with Mr. Ausubel, I imagine, before you testified?

A Yes.

Q And he went over the facts of the accident with you?

A Yes.

Q And the kind of work you were doing at the time?

A That is right.

Q Then you took an oath and you swore to tell the truth the same way as you swore to tell the truth here?

A That is correct.

Q Do you recall being asked these questions, giving these answers? At page 23, line seventeen.

"Q Was any part of the overhang attached to the coping?

"A I don't remember now if any part was attached to it."

Did you give that answer to that question?

A I don't remember now.

THE COURT: Do you remember giving that answer?

THE WITNESS: I don't remember giving that answer.

MR. AUSUBEL: I will stipulate that the transcript so reads.

Q Is that true, sir, in 1970 you didn't recall any attachment to the coping?

A I just don't remember. I saw these pictures and I

can say what I see now that the coping would have to have a rivet in it.

MR. HAUT: May I request in fairness to the witness, counsel continue with the next question and answer which will elucidate the entire problem.

THE COURT: That is up to counsel.

MR. HAUT: It is unfair to take one question out of context.

MR. FUREY: I think it is unfair to interrupt my cross examination with an absurd statement like this.

Q Page 23, line 21. Did you give this answer, Mr. McLean?

"Q Was it attached simply to the face of the building?

"A I think it was on the face of the building, but once in awhile there may be a rivet there that you might put in on some jobs. I don't know whether I did it on that one, too, or not."

Did you give that answer?

A I probably did.

Q In 1970, did you think it was just on the face of the building?

MR. AUSUBEL: Just a minute. He purports to characterize the last answer and the answer speaks for itself.

I don't think it is an appropriate paraphrase or characterization.

THE COURT: He can characterize the answer and the witness can accept or reject it.

MR. FUREY: May I have the question read back?

(Record read)

A I don't remember now.

Q In any event, sir, the way that this job was laid out for you initially, the instructions that you got, you were always advised that the triangular brackets should have their weight borne by the wall brackets, is that right?

A We put them up that way. I don't know what you mean by we were advised that they would hold the support by someone.

Q You put them up that way because that is what United Porcelain wanted you to do?

A That is right.

MR. HAUT: Objection. He is testifying for the witness.

MR. FUREY: This is cross examination.

MR. HAUT: That is not a question.

THE COURT: The witness can say no to that and the jury is instructed, as I think I probably said, I can't remember what I said in other cases, but a question is not

evidence. Whatever the question may be, it is not evidence if the witness says no to it. If the witness says yes, then the question and the answer become evidence. If I ask you were you in Philadelphia on such and such a day and the witness say I don't remember, there is no implication that he was in Philadelphia on that day. If he says yes, it is established. If he says no, forget it.

Q In any event, sir, the aluminum which was on this overhang did go over the coping, is that right?

A The decking part you mean?

Q Yes.

A Yes, it would go over the coping.

Q If the triangular brackets pulled away from the wall brackets, they might very well drag that coping with them, would they not?

A I don't know. I don't know what you mean there.

Q Mr. McLean, when you put the wall brackets up, you were working just against the wall by the coping?

A Yes, right near the roof.

Q When you were putting in the top rivet on those wall brackets which we see in those pictures, how far was your head from the coping?

A I would say about that much (indicating).

Q Your head was just opposite the coping?

A It would have to be.

Q As you worked your way along that building then, at sometime or another, your head was one foot or two feet away from the coping, right?

A Yes.

Q Did you at times lean against this coping as you steadied yourself on this ladder?

A Lean against the coping?

Q Yes.

A I don't remember.

Q In any event, as you worked your way along this building with your head two or three feet away from the coping, did you notice anything wrong with the coping?

A I didn't look to see if there was anything wrong with it.

Q You were going to put this aluminum over the top of it, weren't you?

A Yes.

Q If there was anything wrong with it, you would have noticed it, wouldn't you have?

A Not necessarily. I am not looking underneath the coping.

Q The very coping that gave way, before it gave way, you put aluminum over the top of it?

A Yes.

Q Did that require you to touch the coping?

A No. You don't touch the coping when you bring that over. That goes into a fascia, it comes along your top bracket, then it comes over here and you have a piece of this down.

Q Do you know at this time whether or not you put anything into the coping as you worked along there, whether or not you drilled into the coping?

A I saw the pictures, I will tell you, and according to that, I probably put a rivet in those brackets up there.

Q But you don't know one way or the other?

A If they are down --

Q Let me ask you this.

If you were putting a rivet into the coping, you wouldn't put it in if the coping was loose?

A Not if it was loose.

Q In using this drill, this hammer drill, if the coping was loose, you would have seen it?

A It doesn't go that way. It goes this way. It is a very light tap hammer.

Q If it goes this way --

A You can make it as light as you want.

Q You would see that the coping was loose?

A If it is loose, yes. I am not an engineer to tell you it would move under those conditions.

Q As you worked along this coping, whether you did or did not put rivets in it, you didn't see any loose coping?

A You can't tell by looking at it. This may be loose and I am looking at it. If I went like this, maybe it would fall off.

Q If it was loose and you put your hand on it, you would know it?

A You don't take a twelve inch by three inch by four foot thing, a hunk of concrete, touch it and just push it.

Q And if it is loose, it wouldn't rock under your hand?

A I don't know if it would rock. If it was set in cement --

Q In any event, you worked your way along there putting the wall bracket up?

A Yes.

Q Then you came along with the triangular brackets and did the same thing?

A Yes.

Q Was anybody working with you?

A No, we work together, that is all.

Q When you were putting on the corrugating cover on,

was somebody up on the roof working to put that on?

A We were both of us doing it.

Q And this had to be fitted on top of the coping?

A You just bend it down.

Q You bend it down over the coping?

A Yes.

Q And all of this time you didn't see anything wrong with the coping?

A No.

Q Will you agree, Mr. McLean, it would be foolish for you and Mr. Linfante to put your weight on the overhang?

A You mean onto the edge? I would say it would be foolish.

Q How about in the middle?

A In the middle -- I suppose it would hold you, but we would go only part way out, then lean the rest of the way.

Q Did you go part way out and put your weight in the middle of the overhang?

A You keep explaining the overhang, but the overhang goes from the roof all the way out. It is also over the coping, which is when you go underneath it, you have the wall, so the part you are talking about is only 30 inches out from the wall.

Q You agree it would be foolish to put your weight

on the edge of the overhang?

A On the outside part.

Q Can you tell me whether or not you think it would be foolish to put your weight in the middle of the overhang?

A I would say half foolish.

Q That would be half foolish?

A If you want an opinion from me, I don't know the strength of a rivet or ten rivets or the wall bracket. That would have to be an engineer. We have done jobs like this every week. We have done 75 jobs done the same way, you kneel down the same way, put the lights out the same way. The only difference is, this one had something wrong, something went down.

Q It sure did.

A We wound up in the hospital and you are asking me all these questions and I am trying to answer to the best of my ability.

Q Didn't you tell us previously when you were taught this job, when you were taught this procedure, that Harry the foreman told you not to put any weight on the overhang, didn't he tell you that?

A I don't know how you asked that question just now.

THE COURT: Did Harry the foreman tell you that or didn't he?

A I think I told you that they put the lights on the first job to show us how they did it and they kneeled down to do it.

Q When he knelt down, he didn't put any weight on the overhang?

A To kneel down on any part is on the overhang. That is part of the overhang.

Q What he means by the overhang, although he doesn't seem to say so, the part of the overhang that projects away from the wall out.

THE WITNESS: When he is on the overhang --

THE COURT: You two people mean different things. He means the part from the wall out, that is what he means by overhang so try to go along with him because you can't change him.

Q When you got your instructions from the foreman for United Porcelain, did he tell you it was bad practice to put your weight on the overhang?

A No, he never told us.

Q But you knew it would be foolish to put your weight at the edge of the overhang?

A Yes.

Q Calling your attention, Mr. McLean, to Defendants' Exhibit A3, the lights that you were going to install, do they

show on that photograph?

A Do the lights show here?

Q Yes.

A Yes.

Q Would you put a "L" on that picture and draw an arrow to one of the lights.

This light goes at right angles to the wall, is that right?

Right angles?

Q Yes. Is it a fluorescent tube that points toward the wall as opposed to running parallel to it?

A It is parallel. It runs along the face of the building.

Q Is the light visible here or is it hidden by the aluminum?

A The light itself?

Q The tube.

A The tube is inside.

Q So you can't see it there?

A No, you can't see it.

Q Sir, you have a face piece of aluminum at the very end of the overhang, is that right?

A That is right. That is the fascia.

Q In order to put the light in, you have to go over

the top of the overhang and under the fascia to hook the light in?

A No. I don't understand that.

Q Let me ask you, sir, at the time you were going to install these lights, showing you Defendants' Exhibit A4, Defendant's Exhibit A4, sir, looks up under the overhang, is that right?

A That is right.

Q Is there an area there showing the corrugated aluminum decking on the overhang?

A Yes.

Q Would you mark that, sir, mark the corrugated aluminum decking "CAD".

Was that in place at the time you were installing the lights when your accident happened?

A Yes.

Q In order to reach the area where the lights were, you had to put the lights in from the outside of the end of the overhang, is that right?

A If this is the end, we just lean out and like that.

Q You have to lean out and go up under the fascia?

A Your arm leans out. You pull it up in the slot and drop it down into the bottom slot.

Q You are working from the outside edge of the overhang in underneath?

A Yes.

Q Sir, are you telling us that you and Linfante were up on the coping when you installed these lights?

A Approximately on the coping.

Q And the overhang was 30 inches out from the wall?

A Yes.

Q Sir, do you recall giving these answers to these questions at the examination before trial at page seventeen, line 23.

"Q When you got up on the roof to install the lighting fixture, how did you perform that act, what did you do?

"A We put the lights in the position they are going to go onto the overhang. We laid them out there."

Did you give that answer to that question?

A Yes.

Q "Q You laid them out along the length of the roof?

"A Yes, on the inside point. Then we would take them from there and go out. That was it. You just took the first one and we kneeled down here on a piece of wood that we always put down before we did this job. We

always kneel on a piece of wood because you have a corrugated decking as a roof."

Did you give that answer?

A Yes.

Q "Q Corrugated decking?

"A It is an aluminum roof that sticks into your fascia. There is a fascia opening about that wide where this corrugation slips into aluminum of like --

"Q What are you calling a fascia now? Are you calling part of the roof itself a fascia?

"A That is the fascia that I told you about before that takes the two bolts. That is the one that is going to receive the light fixture."

Did you give those answers?

A Yes.

Q When you bolted this fascia onto the end of the overhang, how did you reach that area, did you do it by ladder?

A What area?

Q When you bolted the fascia onto the end of the overhang, did you do it by climbing a ladder or by working at the top?

A I forget now. That is the one that gets bolted to the bracket. That could be done two ways.

Q You could do it by ladder or you could climb out on the overhang?

A You could. You could also reach out on your bracket there and just lean there and drill. We have a big clamp, a "C" clamp that fits over the two. You put that down.

Q When you say it can be done one or two ways, the other way would be to go up the ladder?

A Yes. That means you have to get down off the roof and set up there and be in the fellow's way.

Q And that is more trouble?

A It would be more trouble.

Q And you could put the lights up the same way?

A Which way?

Q By using a ladder, except it is more trouble?

A That would be more dangerous.

Q It wouldn't be dangerous to go up there on the ladder and put the bolts in, but it would be dangerous to go up there with the light?

A If you compare a bolt with a light --

Q Didn't you carry the lights up the ladder?

A Not that way. The ladder is opened in that "A" shape. If we had to put them up the way you say and we would have to put two of them up and put the plank across because two of us would have to work with it. On a twelve

inch plank, they have a thing up there and you would try to lift it into it. You couldn't do it, you would be floating.

Q You might have an accident?

A Yes.

Q Page eighteen, line 22.

"Q You knelt not on the roof itself, but on the overhang where the fascia was, is that what you mean?

"A Yes."

Did you give that answer?

A Yes.

Q Is that true, did you kneel on the overhang?

A Yes. I can explain that overhang. You keep saying the overhang. It is that part that is even back of the roof. It is one continuous piece. That decking is part of that overhang and I would like to explain that.

Q You have been in the construction business a long time, is that right?

A Pardon?

Q You have been in the construction and alteration business a long time?

A Not a long, long time.

Q You know what an overhang is, don't you?

A I know what an overhang is.

Q An overhang is something that sticks out from the

wall?

A Yes.

Q And you were kneeling on that overhang where it stuck out from the wall?

A Part of it.

Q In the middle of it?

A I wouldn't say it was in the middle of it.

MR. FUREY: Nothing further.

THE COURT: We will take a brief recess.

(Recess)

(In open court - jury present)

CROSS EXAMINATION

BY MR. BRILL:

Q Mr. McLean, would you be good enough to tell us your height and weight?

A Now?

Q Let's bring it back to 1966, the date of this accident.

A My height I believe is 6'1". The weight at the time I think was 212, I believe.

Q I don't know whether this was cleared up or not, but when you and Mr. Linfante were putting this overhang on, had it reached the point where the overhang was covered?

A At the time we put the lights up?

Q At the time you were putting the lights up when this accident occurred, was the top of the overhang shielded and covered?

A Yes.

Q So it was perfectly flat?

A Corrugated.

Q It was corrugated, but it was solid?

A Yes, it is a decking, roof, whatever you want to call it. We call it a decking.

Q Until you put that decking, that corrugated decking on, it would have been a place where you could have stepped down into it?

A That is true.

Q If you look at this photograph marked Plaintiffs' 14 in evidence, would you tell us whether the overhang which is shown on this photograph after the accident, indicates whether the decking is on the, the corrugated decking is on as a cover or hasn't been placed there yet?

A What was your question again?

Q Does that photograph indicate whether the decking has already been put in place on the top of the overhang?

A Yes. You can see it on this side.

MR. BRILL: I don't think I have any further questions.

THE COURT: Anything else, gentlemen?

MR. DUBROWSKI: Yes, your Honor.

CROSS EXAMINATION

BY MR. DUBROWSKI:

Q Mr. McLean, the second time when you left the hospital in September, I believe it was, 1967 -- is that so?

A I can't remember the date.

MR. AUSUBEL: I think Mr. Dubrowski's dates were wrong. July 27th to August 3rd.

Q So you left the hospital August 3, 1966, is that right, sir?

A Yes.

Q And you hadn't gone back to Harlem Hospital since that time, had you?

A I went back under Dr. Shelton's care as an out-patient.

Q When?

A I went a few visits there, then I went to Columbia Presbyterian.

Q And you don't have any records concerning Columbia Presbyterian or here?

A I don't have them. I don't know if my wife has any notes on them.

Q Is Dr. Shelton still around?

A He is still up there.

Q Is Dr. Willner still around?

A Yes.

Q Let's get back to June 28, 1966.

You say you started this job on June 24th, sir?

A Yes.

Q And on June 28th you were putting the lights up, right, sir?

A Yes.

Q Everything had been done up to that point?

A That is right.

Q What time did you start work that day or that time?

THE COURT: Which time?

MR. DUBROWSKI: June, 1966.

Q Say on June 24th.

A Say about seven, something like that.

Q What time did you end the day?

A About 3:30.

Q So that on June 28th, you also had the same hours?

A That is true.

Q So this was pretty close to quitting time when this happened?

A I would say so.

Q How long did it take you to put all this stuff from

down there to up on the roof?

A It all depends on the size of the station. You may get more material.

Q You remember what the station was like?

A Yes. I have to think. I didn't know I was going to be asked the question to estimate back the time. I would say maybe an hour and a half, two hours.

Q When you put it up, like the stuff you were sliding up the ladder, you slid it up over the coping?

A The ladder extends up over the coping.

Q It goes up over the coping?

A We try to go over the top of it like that (indicating).

Q How about the 60, 70 pound lights? You say you took them halfway up the ladder on your arm and you tipped them up and pushed them and the guy on top pulled them up?

A Yes.

Q When you tipped them, did you tip them onto the ladder or the coping?

A Onto the ladder. The round rungs on the ladder. It is a porcelain finish and we just get up the ladder so far, then lean it over, then push up and the fellow on the top would grab it, then you push it up the rest of the way.

Q And there is no problem with that?

A No.

Q By the way, you and Mr. Linfante were the ones putting this thing up, right?

A Yes.

Q There was nobody else there from United Porcelain?

A No.

Q Was there anybody there from Beaman Corporation?

A No.

Q So you two were the only two workers there?

A That is right.

Q That is for the whole job?

A That is correct.

Q Do you know what day of the week June 28th was?

A No, I don't.

Q Let me refresh your recollection on that.

I show you a calendar for the year encompassing 1966, sir.

A According to this, it is a Tuesday.

Q June 24th was a Friday, right, sir?

A Yes.

Q How many brackets, wall brackets did you put in from the beginning to the end?

A I don't know. Whatever came on the job we put on. I don't know how many there are.

MR. DUBROWSKI: Do you have the architect's plan?

MR. AUSUBEL: I have the plan in evidence.

Q From Defendants' Exhibit B in evidence on the third page, could you tell from this, sir, how many brackets, wall brackets you had to put up?

A This is the same job? It is hard to read this.

THE COURT: Isn't this fact known?

THE WITNESS: I don't understand this one.

MR. DUBROWSKI: It has never come up.

THE WITNESS: This is a two-sided thing and we were on one straight piece on Eighth Avenue. There is no lighting on the side or anything.

THE COURT: The picture seems to show a two-sided thing.

THE WITNESS: We were on a one-sided thing with an offset over the office, I believe. It came out, then it went down to 116th Street on Eighth Avenue.

MR. AUSUBEL: Your Honor, my recollection was that they modified the original program.

THE COURT: I thought that picture looked to me like a two-sided --

THE WITNESS: This shows two sides.

THE COURT: I see, this isn't the two sides, it is just the wall. It comes in and zigs and zags.

The testimony was that the job varied at one point.

Q Let me ask you this, sir. Would you say you put approximately 30 in?

A Every 40 inches or so there would go on one of these wall brackets.

Q Is it more than 30 or less than 30 or can you give me any approximation?

A You would have to figure out how many feet.

Q You were there, maybe you could help us.

THE COURT: The chart must show how many feet there are.

MR. DUBROWSKI: As I said yesterday, your Honor, the print is too fine for me to read even with the glasses on.

Q There were a number of them?

A Yes, quite a few. Every 40 inches or so.

Q How many rivets did you have to put in the wall for each bracket, wall bracket?

A I think there is ten in it.

THE COURT: Ten rivets?

THE WITNESS: Ten rivets in the wall bracket. They are spaced about four inches apart, I think.

Q So you had to drill a hole for each one of these?

A Into the wall.

Q And put the rivet in?

A Yes.

Q And do it for this considerable number?

A Yes.

Q Do you recall when you finished that, whether it was Friday, Monday or Tuesday?

A I don't recall that.

Q Then you had to go through all the other steps to get everything done to put the lights in?

A That is correct.

Q And that was all done in two and a half days, or almost three, you were getting close to quitting time on Tuesday when you finished that?

A Yes. It was about 2:30 in the afternoon.

Q And you quit at 3:30?

A Yes.

Q Sir, you said i was not dangerous to put a bracket, the bolt in on a roof to hold the aluminum in place, right? I am sorry, you said it was dangerous to put the aluminum in place -- you said it was dangerous to fasten the bolt in from the roof and you did it from a ladder.

A I said you could do it from both ways, either from a ladder or -- from the fascia are you talking about?

Q Aluminum.

A Everything is aluminum on the job.

Q The overhang. The last thing you put in before you put the lights on, you bolt on?

A That is not the last thing. The decking is the last before the lights.

Q The decking, is that bolted in?

A No, it is riveted.

Q Didn't you say to Mr. Furey that it was more dangerous to put this in from the roof?

THE COURT: He said it was more dangerous to put the lights in from the roof.

MR. AUSUBEL: More dangerous to put it in with a ladder.

THE COURT: That is right.

Q Sir, do you recall working in the area where the accident occurred, who used this drill to drill a hole?

THE COURT: Which hole are you talking about?

Q The hole for the wall bracket.

A I don't recall.

Q One of you did it?

A Yes. One drilled, one put the rivets. We alternated.

Q You hit it with a hammer?

A Yes.

Q When you hit it with a hammer, you had to hit it with enough force to make the inside expand and hold it?

A The pin will go level with the head of the rivet.

Q Mr. McLean, this overhang, how far did it extend out from the edge of the roof to the edge of the overhang?

A From the edge of the roof?

Q Right.

A That is about 30 inches.

Q And you had to extend yourself out this 30 inches, you and Mr. Linfante, to put in these lights on the end of this thing and fit them into a place, right?

A Right.

Q And these lights weighed, you say, 60 to 70 pounds?

A Yes.

Q And the two of you had to extend yourself out and go in, is that right?

A One arm goes out and your head is over.

Q Your testimony is that you were kneeling on the coping, on top of the coping, is that correct?

A Yes, approximately on the end of the coping. It is in that area.

Q Let's get it straight now, sir. Were you kneeling on top of the coping or the --

A You have to understand one thing. You can't see the coping. The coping is underneath the decking, so we would go out approximately to that point, put our wood down and kneel

on it, as far back as we could for our own good.

Q You say the overhang hangs 30 inches out from the roof?

A That is right.

Q How many inches does it cover the coping?

A Maybe about twelve, thirteen, fourteen inches.

Q I will take fourteen, all right.

You have fourteen plus 30 is 44 inches altogether?

A It is not 44 inches. It is about 40 inches I said.

Q The whole decking is 40 inches?

A Yes.

Q The decking extends out from the roof 30 inches to the end?

A That is right.

Q You had a piece of wood down known as firring?

A Yes.

Q And firring is about two inches by three-quarters, a half inch?

A It could be two and a half inches. Firring is two or three inches wide.

Q It is just a small piece of wood?

A Yes.

Q And your knees fit on that if you are kneeling down?

A That is right.

Q When you were kneeling on the firring on top of the decking, where were you on this overhang, were you in the middle of it, were you within that twelve inches or ten inches on the roof or were you further than the middle?

A We were toward, by the coping part.

Q Where were you say from the point where it starts on the coping, where was that firring and where were your knees?

A From the end, we would say it was about fourteen, fifteen inches. It all depends -- you would kneel down -- the same as we did every job we would do the same thing, same procedure.

Q People do jobs sometimes, sir, a little differently and that is what we want to know.

A You couldn't do it differently.

Q Then you were a quarter of the way out on the overhang when you knelt on the wood to extend your arms out with this 60 pound weight and put it in.

A I have to ask you just exactly what you mean on that overhang because you said the overhang and before you said on the edge of the coping.

If you want me to answer a quarter from this --

Q What do you mean by the overhang?

A The overhang is the whole thing going in toward the

roof, that is the whole part of the overhang. You can't cut it off and say it doesn't belong there.

Q I am not asking that, sir.

The top of the overhang is called the deck?

A Yes.

Q So the whole deck extends over the coping and goes out?

A Yes.

Q And that is the thing you put the piece of firring on to kneel on?

A That is right.

Q That is all I want to find out.

Where was this strip of firring, was it over the area of the coping or was it out a little bit or where?

A It was just about with the coping, near the edge of the coping. That area someplace in there.

Q If you take the whole deck and put the piece of firring where it was, would that be a quarter of the way out of the whole thing?

A It wouldn't be a quarter.

Q Would it be less?

A No. If it was fourteen inches for that and four times fourteen would give you more. It is only a 40 inch piece.

Q So it was only about three-eighths -- I will take one-third.

MR. AUSUBEL: He wants to get fractions after we have gotten specific measurements.

Q Sir, do you remember on your examination before trial on page 42, line 25:

"Q Mr. McLean, would you describe to me where you were in relation to the overhang in the roof just before you fell?

"A About halfway out on it on a piece of wood."

Do you remember that, sir?

A I don't remember it.

Q Do you remember being asked by Mr. Furey, he just finished asking a question on page eighteen, line 22.

"Q You knelt not on the roof itself but on the overhang where the fascia was, is that what you mean?"

MR. AUSUBEL: Your Honor, I am raising an objection upon the ground this is improper cross examination on his part. This was all gone into by Mr. Furey.

THE COURT: He can have his fling at it, too.

Q "You knelt not on the roof itself, but on the overhang where the fascia was, is that what you mean?

"A Yes."

Do you remember that, in 1970 --

THE COURT: Obviously he doesn't remember but I suppose it can be stipulated.

MR. AUSUBEL: I stipulate whatever he is reading is in the transcript.

Q The next page --

THE COURT: This is a custom lawyers have, asking him whether he remembers a question and answer five years ago and obviously he doesn't because he admits that is what the transcript says.

Q "Q How far out onto this overhang did you kneel?

"A I would say about halfway. We put our wood down, then we knelt there and we had the light in front of us and we just lean over and put it into the track."

THE COURT: You said that then. What inference do you want to draw from that?

MR. DUBROWSKI: He is out over the roof.

THE COURT: All right, but don't ask him the question.

MR. DUBROWSKI: I thought you were asking me a question.

THE COURT: I was asking what are you going to do next.

Q In 1970, when you testified under oath, was it true

what you testified to?

A I assume it was. To the best of my ability -- you ask me something, I say about fourteen inches, about sixteen. We never took a ruler and said put the wood out so far or that. We never did any measurement like that. We measured with rulers for the job.

Q About how long were you out there on this overhang or wherever before this accident occurred?

A When we put the wood down and kneeled on it --

Q How long in time --

THE COURT: He is trying to tell you. He is trying to estimate the time. He didn't have a stop watch.

A After we put the wood down, we kneeled on it and we pushed the light out in front of us into a position where we could pick it up and lift it over the edge and bring it in. Kneeling here and that, a minute.

Q Did you pick this light up before the accident occurred?

A Yes.

Q What did you do with it, did you do anything with it or did the accident just happen?

A We picked it up, went like this (indicating) to put it in and that is when we went down.

THE COURT: You mean you had gotten the light just

about to the point where it was to be put in?

THE WITNESS: Yes, just to lift it over the edge and that is when it happened.

Q To put the light in, you had to lean out, right?

A Your arm has to be out but the back part of your body doesn't have to be out there. You are kneeling down and your feet are over the coping.

Q Sir, on page 45, line 20, do you remember on the examination before trial being asked this question and giving this answer:

"Q How far from the edge of the building was the firring strip?

"A About fifteen inches. We put it about halfway between here and there, so we could kneel on it to distribute the weight because of these brackets underneath. We will go from one to the other."

Do you remember giving that answer to that question?

A I probably did.

Q On page 20, line seven, do you remember being asked this question in 1970:

"Q Were both of you kneeling out on the overhang about a foot and a quarter out from the face of the building when the accident happened?

"A Yes."

A I probably answered it that way, too, but maybe I was thinking from the edge instead of the face of the building.

MR. DUBROWSKI: That is all.

MR. HAUT: No questions.

REDIRECT EXAMINATION

BY MR. AUSUBEL:

Q On that same page 20, after that question and answer were given, were you asked this question by Mr. Nicks, the attorney for Gulf:

"Q What caused you to go down?

"A The roof gave way."

Did you give that answer at that time?

A Yes.

Q Was that the truth?

A Yes, because we fell.

RECROSS EXAMINATION

BY MR. FUREY:

Q "Q Roof? Or the overhang?

"A The roof, the overhang, I couldn't fall through the overhang, I would have to fall when I went down."

MR. FUREY: That is all.

THE COURT: Is that the end of this witness?

MR. AUSUBEL: Yes.

THE COURT: You may step down.

(Witness Excused)

THE COURT: Why don't we adjourn now until a quarter of two. Everybody try to be prompt.

(Luncheon Recess)

jw-1f-231

AFTERNOON SESSION

1:55 P.M.

(Trial resumed - jury present)

J O S E P H L I N F A N T E, one of the plaintiffs, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. AUSUBEL:

Q Mr. Linfante, where do you live, sir?

A 341 Mansfield Avenue, Secaucus, New Jersey.

Q Now, are you married, sir?

A Yes.

Q And what is your wife's name?

A Susan.

Q Do you have any children?

A Three children.

Q How old are they?

MR. FUREY: This is objected to, your Honor.

THE COURT: It is background.

MR. FUREY: Respectfully except, your Honor.

A One is six, one is five, one is two and a half years old.

Q May I ask you how long have you been in this country?

A Since 1960.

Q And you arrived here, what occupation did you then -- what job did you then have?

A I went a week or two later -- I went to work for Colonial Neon.

Q What kind of work?

A As sheet metal work -- as apprentice in the beginning.

Q I see. How long were you an apprentice at Colonial Neon?

A I was two or three years.

Q I see. What field were you apprentice in?

A Erect sign, any neon and everything else.

Q I see. How long did you work for Colonial Neon?

A Until about August, '65.

Q And then what did you do?

A I was slow. I went back to the union hall because I belonged to a union, 172 Sheet Metal Workers, and Sol Casso, my boss, the next boss called the hall so I had to report to him. I went to Sol Casso's office to talk, he wants interview me.

Q Sol Casso is from United Porcelain?

A Yes, sir.

Q When did you go to work for United Porcelain?

A Since I left the Colonial, about three days later.

Q And that was in 1965?

A Yes.

Q From that time on, and up until the date of this accident, who did you work for, what company?

A United Porcelain.

Q What were you hired as when you went to work for United Porcelain?

A I was hired as a sheet metal worker and erecting overhang and prefabricating station.

Q Did you work on any specific kind of place when you worked for United Porcelain?

A The first station was prefabricated station.

Q Were these service stations you worked with during the time you worked with United Porcelain?

A Yes, all service stations.

Q When you first went to work for United Porcelain, did you get some instructions or training in connection with your job?

A Yes, because the first one was prefabricated station and I met two other sheet metal workers there and the third one was from Beaman Corporation at that time.

Q Was somebody down from Beaman at that time?

A Yes.

Q During the time that you worked for United

Porcelain, the time you went to work in 1965 up until the time of this accident, did you work with Beaman Corporation materials?

A All the time.

Q And what kind of materials were these that you worked with?

A Most of them were aluminum, made all aluminum parts.

Q Aluminum?

A Yes.

Q Could you tell us what training you got in connection with how you were to do your work after you went to work for United Porcelain?

A First time sheet metal work and I have good idea what the work is concerned and everything.

Q Yes.

A Plus when I was interviewed from Sol Casso, he give me the general idea of what was the next kind of work concerned, overhang and everything, he give me what overhang and after he send me with three other guys, because at that time was crew four guys to learn how they do the job and everything.

Q All right. What did you do, learn how to do the job?

A Sol -- everything they put on, they showed me how they do, they let me -- I helped them to do things and it is in the manual way, the way -- training on the job.

Q Did you have to deal with putting on these corrugated overhangs?

A Yes, most of the time it is what the things was, most of the time it was overhang.

Q Were you trained how to put on the brackets, those triangle brackets?

A Yes.

Q And about the rivets?

A Yes.

Q About the lights, the perimeter lights?

A Yes.

Q What training did you get with respect to that, that is, from where were you supposed to do the work and how were you supposed to do the work?

A You go to job with training people, so you help them set the ladder, you help them on the ladder, you put material on top of the roof and they show step by step what you are supposed -- how you do the work and you work two or three jobs -- a few jobs with them and after they put another guy as steady crew.

Q How many jobs did you work on before this accident

after you went to work for United Porcelain?

A I would say about 25, something like that.

Q Did you work on those jobs at any time with Mr. McLean?

A Yes, after the first phase, meaning -- they sent you with another guy as steady crew together all the time until finished.

Q As of the time of this accident, was the man you were assigned to work with, Mr. McLean?

A Yes.

Q When you did these various jobs, the 25 jobs before this accident, did you do them substantially the same way?

A Yes, most every crew has almost the same part to do because they come there with experience and most -- every crew, I don't see any difference from one crew to another one. They must do the same steps one at a time.

Q There came a time when you were sent on a job to this Gulf Service Station located at Eighth Avenue and 116th Street in Manhattan. Do you remember that, sir?

A Yes.

Q About how long before this accident were you sent down to work on this job?

A About four days -- three or four days.

Q Without my asking you what you did each day, could

you tell us generally what you did when you first came onto the job right up until the afternoon when the accident happened?

A We drove to the job. We asked the attendant there where the material was located. And it was between the space -- between the base where they put the car on one side, right between there was the material. So we open the box, we check the material, was a list of how much material, and we finish -- we just pick up a ladder, we ascended the center part, we plugged the wall and start to take the material out to put on the roof.

Q Then what did you do?

A And when we had it all down, we set the two "A" ladders with the plank across and we started to put bracket on the building.

Q Yes?

A And when we finished -- we did a section at a time and we put up the upright bracket and after we put the triangle attach, we switch on the next one. When we finish that, we put the front fascia. After the fascia we put the corrguate decking. And when we finish with the corrugated decking we were ready for the lights.

Q When were you ready for the lights? About what time was this on June 28, 1966?

A I would say about after lunch sometime.

Q Tell us what happened after lunch.

A Sometime after lunch we went on the roof. We take all our stuff out from our way. We pick up the light. We put on the deck. We put piece -- we took a piece of pine, we put that on the decking and we both went up, we nail on the piece of pine. I was on the inside. Mr. McLean was on the outer edge and we when we went to pick it up, soon we start the bulb to put the light in place, everything went down -- all of a sudden everything went down.

Q Did you look up to see the area where the collapse occurred?

A Yes, after awhile because I was there attended by police and everything and Mr. McLean was on top of the ice machine and at the time of the emergency they pick him up and everything so I was all the time there, so I saw the part hang down and the corrugated part missing.

Q Did you see what happened to the overhang?

A Some part was hanging. Some was on the floor. I didn't notice in particular.

Q I see. Now, after the collapse occurred, did you feel pain in any part of your body?

A Oh, the first thing, I went to move around, try to walk around, and one foot give way on me.

Q Which foot was that?

A Was the left one. So I went -- outside I see blood all over. I don't know what happened to me. Cut all over the place, I start to see blood all over, but I don't know really.

Q Then what happened?

A Soon the cop took me to the ambulance and I was in ambulance when the one guy, I don't know who it was, whether it was the ambulance or what, cut the side of my pants, put splinter to this part or my leg, put bandage to try to stop the blood because I had a big cut on the right leg. So they --

THE COURT: Indicating about the middle part of the leg on the outside.

A It was a pretty big cut here and blood come out, so they tried to put Band-Aid to stop it temporarily.

Q Then what happened?

A Soon take McLean from the ice machine. They take to hospital.

Q Were you admitted to the hospital?

A Yes, we were in the hospital.

Q How long were you in the Harlem Hospital?

A I was about eleven days.

Q While you were in the hospital, how did you feel?

A Oh, I felt pretty lousy, because I had the foot -- I had the cut here, cut on my arm, I had the black and blue all over my face because, I don't know, when I went on my feet, I went back, something like that, I had black and blue all over my back, my back was bothering me.

Q After you were admitted to the hospital, did there come a time when they operated on some part of your body?

A Yes, they operate on my left foot, because the doctor say was broken, crushed so --

Q Tell us -- go ahead.

A I believe two or three days later they operate on my foot because they say to me the foot was swollen, they had to perform the operation, but I don't know much about it. That is what the doctor said to me.

Q Tell us about the operation. When were you operated on and how long were you operated on and what happened after your operation?

A Oh, they told me the way McLean say before you reach operating room on the tunnel and everything, so they operate on my back foot. And I don't know how long it was, because when I opened my eyes I was downstairs, and I believe right after they put casts from the knee all the way down cast to my foot.

Q Which foot was that, sir?

A The left.

Q Were any parts of your body stitched besides?

A Yes, that is when I was in the Harlem Hospital, but was about six, seven o'clock at night, they stitch the big cut I had on this leg. They put a few stitches on my arm. That was --

Q Which arm is that, sir?

A Was the right arm.

THE COURT: The cut was on the right foot, right leg, and the injury was to the left arm?

THE WITNESS: Yes. Was the cut on the right arm, right about here --

THE COURT: Indicating just above the elbow.

THE WITNESS: And a cut right in the middle of the leg. But the broken foot was the left one.

Q By the way, did you have any trouble with any of these parts of your body that you hurt in this accident before this accident?

A No, I never had no trouble.

Q Were you able to do your work before this accident?

A Yes, because I was in good health.

Q After the time you remained in the hospital for a time?

A Yes, about eleven days in the Harlem Hospital.

Q You mentioned that you had some pain in your back. Did you have any pain in your back while you were in the hospital during those eleven days?

A Yes, I told the doctor. The doctor was to take care of me, and he says show something on the X-ray, but lay down and don't move much --

MR. DUBROWSKI: Objection. At this point it is no longer responsive to the question, your Honor.

THE COURT: I will allow it. Go ahead.

A Was no too heavy. Don't have to put no brace or nothing on my back.

Q Were you confined in bed during the time you were in the hospital the first time?

A Yes.

Q Were you married at the time of this accident?

A Yes.

Q Was your wife then working?

A Yes.

Q Did she come to visit you at the hospital?

A Yes, she was coming twice a day, especially at nights she was coming with my father because the neighborhood at that time was not too good.

Q Then what happened after that, after you got out of the hospital?

A My wife came and picked me up. I went home. And because Harlem -- the doctor did the operation was in New York, was too far for me, so she made an appointment with a doctor in Jersey City. At that time I was living in Jersey City, so she made an appointment with another doctor in Jersey City.

Q Did you continue to have that cast after you left the hospital, the cast on your left leg?

A Yes, I had the cast since I left the Harlem Hospital until I went -- the end of September I went to another operation at St. Francis Hospital in Jersey hospital.

Q I see. I think the record is in evidence. You were admitted on September 26, 1966, at St. Francis?

A Yes.

Q How long were you in St. Francis at that time, about?

A About a week.

Q What did they do for you at St. Francis during that time?

A I went St. Francis. They took the cast and I went in the operation room because they said they had to remove the pin from my left foot.

Q Between the time you left Harlem Hospital and the time you went to St. Francis Hospital, how did you get around the house?

A Oh, with crutches, a little bit of time. It was the only way I was able to go around. Sometime my wife helped me. Try to do the best.

Q Did you have any pain in any part of your body during that time between the hospitalization?

A Oh, yes, I was -- my back was bothering me most of the time and I complained about my casts to the doctor so took that one off. He made another one. But still was bothering me. And he explained on the back under the skin I have a pin and so everytime I was turning around the cast was shifting and hit the pin there. The pain was caused by the cast, but he could do nothing about it.

Q In St. Francis, what did they do with respect to your cast and your pin?

A They took the cast off. They never put back. And I went -- the way I said I went in the operation room. They took the pin, they cut again, they took the pin off from my left foot, my left heel.

Q How did you get home from St. Francis Hospital?

A My wife picked me up.

Q What did you do after you got home from St. Francis?

A Oh, I was treated from Dr. Fisher and I was going once a week, sometimes twice a week. He checked my foot, how was I feeling. And I was on the crutch for a good while and

go back and forth to the doctor, to see what he can do about it.

Q Did there come a time when you went back to work after this accident?

A Yes.

Q How long were you out of work after this accident?

A It was about ten months.

Q During that ten month period of time, did you receive your salary at all from United Porcelain?

A No.

Q When you went back to work, who did you go back to work for?

A I went to work for the same company, United Porcelain.

Q What kind of work did you do for United Porcelain after you came back?

A About the same work.

Q What did you notice about any of the parts of the body that you hurt in this accident after you went back to work, if anything?

A Well, he asked me, because my foot bother me. If I stay too long on my feet, I have to take a rest, if I lift too many heavy pieces my back started bothering me.

Q Just tell us generally what kind of work have you been doing since you went back to work ten months after this

accident up until today.

A I worked for United Porcelain since after the accident until two years ago.

Q Yes?

A And after they got a little bit slow so I went to work for sign company, but a couple of weeks later they called me back, but --

THE COURT: United Porcelain called you back?

THE WITNESS: Yes, but I was working, I was feel a little bit better because I had to climb no ladder, I was working, no bend over too much, so I refused to come back and work for the sign company, so I now no work for the sign company.

THE COURT: You are working for another company?

THE WITNESS: Yes, they make a neon sign, it is on a bench.

Q In terms of the parts of your body that you hurt in this accident as of right now, what parts of your body give you trouble, if any?

A The one they give me trouble it is in the left heel and my back.

THE COURT: What kind of trouble do they give you?

THE WITNESS: It is pain. If the weather change, sharp pains. If you stand too much on your feet towards the

jw-lf-247 Linfante-Direct

end of the day you feel pain. If you lift weight, your back, you know, if you lift a few times a heavy weight or something, whatever, a little bit more than regular day it bothers you, you go home half a day.

MR. AUSUBEL: You may inquire.

THE COURT: Incidentally, ladies and gentlemen, the fact I ask a question doesn't give the answer any more importance than when counsel asks a question or a stranger. It is what you think that counts.

Are you ready to proceed, or do you want a minute?

MR. FUREY: I am ready, your Honor.

CROSS EXAMINATION

BY MR. FUREY:

Q Mr. Linfante, when did you first become a member of the sheet metal workers union?

A I become as apprentice, so since one week or two weeks after I came to the United States I was as apprentice but still I was belonging to the local union.

Q When you were an apprentice, you were a union member at that time?

A Yes.

Q That was about 1960?

A Yes.

Q When was it that you went to work for United

Porcelain?

A About August, '63.

Q First Mr. Casso interviewed you, is that right?

A Yes.

Q And he told you to come to work?

A Yes.

Q Then he sent you out on a job so you could see how it was done?

A Yes.

Q Do you recall who was on that job showing you how it should be done?

A The way I say was two guys from my local union. There was one guy from Beaman Corporation.

Q Do you remember their names?

A This was a job, the first one I was on, was American station. It was in Keyport, New Jersey, and I believe its name was Potter, something like that.

THE COURT: Which one was Potter?

THE WITNESS: The one from Beaman Corporation.

Q Do you remember the names of the men from United Porcelain who were showing you how the job was done?

A One was Tony, another one was Joe.

THE COURT: One was who?

THE WITNESS: Tony and Joe.

Q Was one of them the foreman?

A No. The guy from Beaman Corporation was there, but I no see as foreman, just to show what we were doing.

Q Did Mr. Potter from Beaman give any directions or instructions on how the work was to be done?

A No, just the procedure, just to show us where to take it over.

Q Did the two men from United Porcelain have experience in doing this kind of job, or was that their first one, too?

A They were about a year before me.

Q Did that job have an overhang on it?

A Yes.

Q And did it have lights to be installed?

A I think so.

Q You hesitated, Mr. Linfante. Do you have any recollection of the lights being installed on that job?

A This one there was a different kind of lighting, this special one, because was go underneath this one. This was -- the one I am talking about now was prefabricated building, was no just overhang. Was overhang, too, but was prefabricated building.

THE COURT: The building on which the overhang was put was a prefabricated building, is that what you are telling us?

A Yes.

Q Can you tell us how that was different from the one where the accident occurred?

A Because the one in the accident, we just went there, the building was already there, and we went and installed.

THE COURT: The other place you put up the whole building?

THE WITNESS: Yes.

Q Did you have to put up the lights on this first job where you learned how this was done, did you put up the lights in the building?

A No.

Q How were they put up the first time when this man from Beaman was there?

A This one was different -- was no porcelain lights, was just strip lights, very light, and it was under the canopy and most of the time when we talking about those lights, the electrician take care of whatever it is.

Q On this first job, the one where you learned about this business, did you put the lights up with a ladder?

A No.

Q How did you put them up?

A I believe the electrician put on that light.

THE COURT: The electrician put up the lights?

THE WITNESS: Yes.

Q So on this job you didn't install any lights at all?

A No.

Q Did there come a time, sir, when somebody gave you some instructions or illustrations as to how to put up the kind of lights that we had on the job we are talking about?

A Yes.

Q When for the first time did that occur?

A Right after this first job.

Q The second job then?

A Yes.

Q On the second job who was there with you?

A There were these other two guys from 172nd.

Q Was the guy from Beaman still there?

A No.

Q On the secondjob, after the man from Beaman was no longer there, how were the lights installed in the overhang?

A It was a bulb job and was the same kind of lighting. When we entered, they showed me how to do.

Q What did they show you? Did they show you to go out on the overhang?

A Probably they don't show me. I worked with them.

Follow them step by step. I helped. Because the first few jobs they don't just give you whatever say go do, so you are the third man, you follow them, you help them. So one when came on the light part I saw them put the piece wood across and install the light.

Q When they showed you, where did they put this piece of wood?

A On top of the overhang.

Q And did they go out and kneel on this piece of wood on top of the overhang?

A Yes, sir.

Q Is this what was done at the time you had your accident, a piece of wood was put on top of the overhang?

A Yes, sir.

Q By overhang, Mr. Linfante, what do you mean by overhang in your trade, your business?

A By overhang? Now you want my opinion which called myself overhang or whether somebody else called?

THE COURT: What you called it?

THE WITNESS: When it is finished, all the parts belong, meaning bracket, upright, decking, that is overhang, meaning the corrugated goes from the extreme part of the overhang over the roof. I consider all of that is all overhang myself.

Q Well, sir, if you consider that part that sticks out from the wall to be overhang, or do you think it is something more than that?

A I no understand your question.

Q All right. The term overhang means something that sticks out from the wall, doesn't it, sir?

A Yes.

Q But to you it would mean not only what sticks out from the wall but what goes over the top of the wall?

A To me whatever I put on there, it's all belong to the overhang.

Q When you say that the piece of firring was put on the overhang, are you talking about the overhang that comes out from the wall or are you talking about the whole business?

A Now, when we talk about that, it is the way I said before, it is from the east side part of the wall to the R.H.

Q Would you agree, sir, that the firring strip that was in place at the time that this accident happened was fifteen inches out from the end of the wall?

A Close to it anyway.

MR. HAUT: Objection, unless he clarifies which end of the wall. I don't know which end of the wall, sir. I think it is an unfair question.

THE COURT: Well, which end of the wall did you mean?

THE WITNESS: Your Honor, sometime he talking about just the overhang from the face of the building and sometime he talking about the end, the overhang, meaning the one that go over the roof. That was the question. If he can make it --

THE COURT: The question he meant or I think he meant was from the face of the building how far was the end. Is that what you meant?

MR. FUREY: Yes, your Honor, I thought it was clear.

THE COURT: From the face of the building.

THE WITNESS: From the face of the building, meaning to the end, the out part from the overhang or the one toward the roof?

THE COURT: No, the outside part.

Q Perhaps I can clarify it. The firring strip.

A Yes.

Q You were kneeling on it at the time of your accident. Would you say it was fifteen inches out from the face of the wall?

A No, sir.

Q Where was it from the face of the wall?

THE COURT: I didn't understand your question either.

Q Where was the firring strip with relation to the face of the wall?

A Almost on a line with the face of the wall.

Q So you would say the firring strip was about 30 inches from the outside end of the overhang?

A Yes.

Q Sir, before the accident were your knees still on that firring strip 30 inches from the end of the overhang?

A Before the accident?

Q Yes.

A Yes.

Q When you were handling these lights, were you using one or two hands on the light?

A I used one hand.

Q Where was the other hand?

A Give me some balance.

Q Give you some balance, some support?

A Yes.

Q Where was the hand with relation to the end of the overhang?

A Someplace on the overhang.

Q Was it someplace between your knees and the --

A Yes.

Q Sir, did you have to take the light with one hand and go out over the end down on the face sheet and bring the light up?

A Could you repeat it?

Q Yes, I will do it a little slower. You have your knees on the firring strip, is that right, sir?

A Yes.

Q And you have one hand out in front of you to give yourself some support, right?

A Yes.

Q And there is no question that that hand was on the overhang portion outside of the wall, is that right?

A Yes.

Q In which hand were you supporting yourself, right or left?

A The right.

Q The right hand?

A Yes.

Q And you had your left hand on the light?

A Yes.

Q And I think you said that Mr. McLean was out by the edge and you were on the inside, did you say that?

A Yes.

Q Were you both on the same piece of firring strip?

A Yes.

Q Was the firring strip running parallel to the building wall or in some other direction?

A Right across.

Q Even with the wall?

A Yes.

Q When you say Mr. McLean was closer to the edge, what do you mean by that?

A I believe he was almost eight feet apart from me.

Q But you were the same distance from the edge of the overhang, is that right?

A Right.

Q When you say inside, you mean you were closer to the middle of the building?

A Yes.

Q Mr. McLean would be to your right or your left as you worked?

A He was on my right.

Q He was on your right and you had your right hand on the overhang, sir?

A Yes.

Q And your right hand on the light?

A Yes.

Q Were your arms crossed like this?

A I had my hand, that is the light, and that is the way I was, and Mr. McLean was on that side. That is the way I was. The light is in between us. That is my hand and that is the one I hold the light.

Q Then, of course, you had to lean forward with the light and could you reach out with one hand on the light as you were moving it out, you and Mr. McLean?

A I guess so.

Q Don't you remember, sir?

A I did.

Q You were looking at Mr. McLean, weren't you?

A Yes.

Q You had to work together on this, didn't you?

A Yes.

Q And then as you moved the light out towards the edge, did you lean forward and put more weight on your hand?

A What do you mean put more weight towards the hand?

Q When you started out you were kneeling straight up when you had the light here?

A Yes.

Q Then you had to move the light out?

A Yes.

Q And then you had your hand out?

A Yes.

Q And then did you put more and more weight on your hand as the light moved out?

A Yes.

Q Then there came a point you had to put the light under the overhang?

A No, it is not under. It is on the front of the overhang.

Q I show you, Mr. Linfante, Defendants' Exhibit A3 and there is "L" on it marked by Mr. McLean. Do you see that "L" with the arrow pointing?

A Yes.

Q Does that point to where the light was?

A Yes.

Q And is the light visible in the picture or under the fascia?

A Visible right on the front of the fascia. This one -- if I recall, that is the face of the building and that is the light.

Q Mr. Linfante, the "L" is down here.

A This one is all light.

Q This is the light itself at the edge?

A Yes, they are light. It is a light. It is all a continuation. It is all light.

Q So it had to go over the edge and in front?

A Yes.

THE COURT: Not underneath?

THE WITNESS: No, not underneath.

Q Then there is a slot there it has to go into?

A Yes.

Q Once it gets into the slot, sir, is there a set screw that holds it there?

A Yes.

THE COURT: You have to screw at that end?

THE WITNESS: No, the light was in place. On the top, right on the top the fascia there is a screw. You just with the screwdriver you drive down, this way the light can jump up from the track. Just keep in place in case windy or something.

Q Do you have to use a screwdriver to turn that down?

A Yes.

Q Did you do that with these other lights?

A No.

Q Who did that?

A We have no light when the accident happened.

Q You did install other lights before this accident happened, didn't you?

A Yes.

Q On the other lights did you use a screwdriver to turn the set screw down?

A Yes.

THE COURT: If the accident hadn't happened, were you planning to use a screwdriver?

THE WITNESS: Yes.

Q When you turned down the set screw on these other lights, did you go out on the overhang to do that?

A No, we placed the light in place. The way we are, we got a screwdriver, just screw right down. We don't leave halfway and go on the next one.

Q You agree, Mr. Linfante, that it would have been foolish to put all your weight out on the overhang, is that right?

A Yes.

Q Mr. Linfante, you recall attending an examination before trial at the office of Berman and Frost, Mr. Ausubel's firm, is that right?

A Yes.

Q And Mr. McLean testified first and then you were questioned. Is that right?

A Yes.

Q Did you give these answers to these questions, sir --

page 57 --

"Q Mr. Linfante, you are one of the plaintiffs in this action?

"A Yes.

"Q And you have sat here in the room today and have heard all of the testimony given by Mr. McLean today, have you not?

"A Yes.

"Q If all of the same questions were asked of you as were asked of Mr. McLean as to the materials that were used, as to your employer, your union, the manner in which the accident occurred, would your answers be the same as his?

"A Almost.

"Q In what way would they differ, your answers differ?

"A Because you questioned him about the ladder, about the brackets, whether we have a long one. If we were on top of the ladder it was unsafe because you carry big lights and can only stand on top there, one wrong move from the other party and you go down. It is much easier, the top of the roof was safe for us, we did so many and everything went fine."

Did you give those answers to those questions, sir?

A Yes.

Q Were you present and did you listen to Mr. McLean give these answers before you gave those answer I just read, sir?

A Yes.

MR. AUSUBEL: Excuse me. If your Honor please, this to me is a most unfair manner of cross examining.

MR. FUREY: Your Honor, I object to that as being unfair. It is grossly improper.

THE COURT: Don't get excited, Mr. Furey. Gentlemen of the jury, a lawyer wouldn't be worth his salt if he didn't call the other lawyer unfair. Proceed.

MR. AUSUBEL: I object to this form of cross examination, to read questions and answers from an extended deposition of another litigant.

THE COURT: Did anybody object at the time when the questions were asked at the deposition?

MR. AUSUBEL: All objections were reserved.

THE COURT: This is an objection to form as I understand. I take it if you didn't object at the time to form, it is too late now.

Q Did you sit there in Mr. Ausubel's office and listen to these questions and answers from Mr. McLean, Mr. Linfante -- page 43 of Mr. McLean's examination, line 25 --

"Q Mr. McLean, would you describe to me where you were in relation to the overhang in the roof just before you fell?

"A About halfway out on it, on a piece of wood."

Did you hear that answer to that question?

A Are you asking me?

THE COURT: Did you hear that?

Q Did you hear Mr. McLean say that at the time?

A Yes.

Q And did you hear this answer to this question, page 45, line 20:

"Q How far from the edge of the building was the firring strip?

"A About fifteen inches. We put it about halfway between here and there so that we can kneel on it to distribute the weight because of these brackets underneath, it will go from one to the other."

Did you hear that question and answer, sir, that Mr. McLean gave?

A I believe so.

Q What?

A I believe so.

Q Was it true? Was his answer true?

A At the time I think so.

MR. FUREY: Nothing further.

FURTHER CROSS EXAMINATION

BY MR. BRILL:

Q Mr. Linfante, were you here this morning when Mr. McLean testified?

THE COURT: I know he was here. Did you hear his testimony?

Q Did you hear his testimony?

A Yes.

Q Did you see him this morning as he leaned over the ledge in front of the witness chair to show how far out his head extended beyond the edge of the overhang at the time this accident happened?

A What do you mean? I don't quite understand. Can you repeat the question, please?

Q All right. I will put it to you this way: did you see Mr. McLean as he testified this morning and when he was asked where his head was at the time this accident occurred, did you see the position that his body was in as he leaned over the rail in front of the witness chair this morning?

A Yes.

Q On the afternoon of this accident back in 1966,

when you were eight feet away from Mr. McLean, did you see his head projecting out over the edge of the overhang?

A We don't watch each other's head. We only --

Q I am asking you if you saw that.

A We only show we are standing on the same piece of firring. I don't watch how much my head or his head project forward.

THE COURT: The answer is you don't remember where his head was.

THE WITNESS: No.

Q The light you were holding with one hand and which Mr. McLean was holding at the other end, that was to be attached on the outside of the overhang, was it?

A Was going to the slot.

Q The slot was on the outside of the overhang?

A Yes.

Q Where was this slot? Was this on the front edge of the overhang, or underneath the overhang, or just where?

A Was right on front part what they call fascias, but aluminum, it is continuously on overhang and slotted right on the front.

Q And how big a slot is it?

A Can't honestly remember.

Q Well, could you show us with your hands about how the

dimensions of the slot were?

A The top of the fascia goes like this way, come down, and got a little hook here. So when you pick it up you drop it, the part of the light stand on the track and the top part goes inside with the set screw.

Q What about the light itself, is that a solid piece of equipment eight feet in length?

A Yes.

Q What are the dimensions -- I am not talking about the length --

A Yes.

Q What is the height of the electric light fixture when it is extended horizontally, this eight feet length?

A Almost cover the front of the fascia.

Q It is almost the same as the front of the fascia?

A Yes.

Q And the front of the fascia is how high?

A Seven or eight inches.

THE COURT: Seven or eight inches?

THE WITNESS: Yes.

Q So this fixture is placed in a slot which will allow the light to be positioned seven or eight inches below the top front edge of the overhang, is that correct?

A No, not exactly.

THE COURT: It is not what he said as far as I can recollect. Flush with the overhang is what he said.

Q Does the light extend above the top of the deck?

A About two inches.

Q It extends two inches above the top of the deck?

A Corrugated finished roof?

Q Yes.

A Something like that.

Q Do any of these photographs which are marked Defendants' Exhibit A-A1, 2, 3 or 4 -- do any of these photographs, which I understand were taken weeks after the accident, do they show where the light was located?

A What's that? What's the question again?

THE COURT: He wants to know where the lights are.

Q Do those photographs show where the lights are?

A This one, see --

THE COURT: He's referring --

A The aluminum is the fascia, whole light --

THE COURT: He's referring to A2. It says for identification, but it is in evidence.

Q I am going to stand alongside of here so the members of the jury can see what I am trying to develop here. What do you call a fascia on this picture?

A See this shiny part, aluminum, the one that receives

the light.

Q What is the height of the front vertical part of that fascia?

A About seven inches, something like that.

Q Where do you say the light was attached on this fascia?

A See the dark spot? See the aluminum part.

Q Isn't that below the lower edge of the fascia as you look at this picture?

A It is almost. I no say the lower. It is right below the middle.

C And you and Mr.McLean were in the process at the time of this accident of placing that light in the position that this photograph A2 shows the light is to be fixed, is that right?

A What do you mean, almost in the --

Q The light you were working on that day, was supposed to be put in the place that you just described?

A Yes.

Q As being below --

A Yes.

Q Let me ask you this, Mr. Linfante, the materials that you found on this job, were they brought there by you?

A No. They were already on the job site.

Q They were already prefabricated, is that it?

A Yes.

Q Everything was cut to the proper length and size?

A Yes.

Q Was there any sheet metal work itself being done by you on this job?

A All the overhang come under the sheet metal workers.

Q I am not asking you what union trade you are listed as, but I am asking whether you, yourself, and Mr. McLean were doing the work of sheet metal workers on this job.

THE COURT: Don't ask him this question. Anything his union does is the work of sheet metal workers.

MR. BRILL: I understood it differently. Perhaps I can clarify it.

Q What is your definition of sheet metal worker?

THE COURT: Ask him what he was doing. His definition of sheet metal workers is not relevant.

Q What you were doing on this job was putting the equipment in place, were you not?

A What kind of equipment?

Q Yes.

A Assembling.

Q You assembled it?

A Yes.

Q And you worked with screwdrivers?

A Yes.

Q And you worked with wrenches?

A Yes. Sometimes.

Q You are not an electrician yourself, are you?

A No.

Q You mentioned before that you had other jobs working for sign manufacturers.

A Yes.

Q You hung signs?

A Yes.

Q Did you ever use scaffolds as a sign maker?

A Most of the time, the scaffold, yes.

Q You did use scaffolds?

A Sometime, yes.

Q Did you ever on any job work where you used ladders using two or more ladders to make a place that would serve as a scaffold?

A Which kind of ladder are you talking about?

Q I don't care. Did you ever work on a job where there was more than one ladder and the ladders were used on the scaffold to hold the board across or to be used on the scaffold?

A No. We used two ladders with the plank across.

Q You did use a ladder with a plank across?

A Yes.

Q But you didn't do it on this job?

A No.

Q How many days were you working on this job before this accident happened?

A Three or four days.

Q Did anybody connected with United Porcelain come to you while you were working on this job, these three or four days, and tell you what to do?

A No.

Q Did anybody else come to you on this job and direct you, tell you what to do on the job?

A No.

Q Did anybody connected with the gas station tell you what to do or how to do your work?

A No.

MR. BRILL: No further questions.

THE COURT: Next.

FURTHER CROSS EXAMINATION

BY MR. DUBROWSKI:

Q Mr. Linfante, in 1966, sir, what was your height?

A Almost same way now, 5'6".

Q In 1956 do you recall what approximately your weight

was?

A About 150, 155.

Q You went to Harlem Hospital and then you went to St. Francis Hospital?

A Correct.

Q You left St. Francis Hospital in October, 1966, is that correct?

A Correct.

Q You haven't been back to the Harlem Hospital or St. Francis Hospital since you sustained this accident?

A No.

Q You say you had been to a doctor in those days?

A Yes.

Q Did you go to a doctor the last time in 1967?

A That day, yes.

Q What was the name of that doctor, sir?

A Fisher.

Q Fisher?

A Yes.

Q Where is he, Jersey?

A Yes.

Q Still around?

A I believe he's dead.

Q When did he die?

A I hear from the newspaper. I no remember now.

Q And that was the last doctor you saw concerning this, February, '67?

A No, I saw another doctor.

Q That was the doctor who testified the other day, Dr. Burton?

A I saw Dr. Burton, I saw my family doctor, Dr. DelBalglivo, D-E-L B-A-L-G-L-I-V-O.

Q Is he still around?

A Yes.

Q The doctor you saw in February, '67, he discharged you, did he, sir?

A Yes, sir.

THE COURT: He didn't say he just died. He said he died.

MR. DUBROWSKI: I know, but he said he was last discharged by the doctor in Febtuary, '67.

THE WITNESS: Yes.

Q Is that right?

A Yes.

Q Sir, let's get the thing down. You say you put the light or it was your intention to put the light into a frame, is that right, sir?

A Yes.

Q Before the light goes on, the frame has to go on, right?

A Yes, sir.

Q In fact, after everything else is done, then you put the frame on and then you put the light on top of that. Isn't that right?

A Yes.

Q Right, okay. The frame goes onto the overhang, it doesn't fit into place, it has to be screwed in, doesn't it?

THE COURT: The frame has to be screwed into the overhang, is that right?

Q Right, sir? In fact, there are two screws to put it in?

A Which frame are you talking about? I no understand.

Q The frame that holds the light has to go into the overhang and is screwed in by two screws, is that right, sir?

A Two bolts.

Q And you cannot put the bolts in from the roof, can you?

A Sometimes, yes, and sometime we put from the scaffold.

Q From the where?

A The two ladders with the plank across.

Q You do it sometimes from the roof, you say?

A Yes.

MR. DUBROWSKI: May I use the blackboard, your Honor?

THE COURT: Certainly.

Q Sir, I think you will have to stand. And please forgive my drawing. I am probably the world's poorest artist.

THE COURT: Does the jury want the shade knocked down?

Q This basically is the roof, right, sir, coming up like that?

A It is part of it.

Q Part of it, right.

That would be the wall, right?

A Yes.

Q That would be the triangle bracket. Right, sir?

A Yes.

Q And that is the bracket the light goes on. Right, sir?

A Yes.

Q And that is screwed in by two screws or bolts that go here and here. Right, sir?

A Yes.

Q And you say sometimes you put them in from the roof?

A Why not?

THE COURT: No.

Q You mean you're on here and you are going down and putting two bolts in here?

MR. AUSUBEL: Just a moment.

MR. DUBROWSKI: Thank you.

Q Is that the way you put it on, sir?

MR. AUSUBEL: Is that a question?

THE COURT: Yes.

MR. AUSUBEL: I object to the question and the argumentative tone of voice.

THE COURT: I will accept it.

Q You can do that from the roof?

A I say most of the time, if you listen to my answer, we put the two ladders and we do from the ladder.

Q How about on this day, on June 28, 1966? Mr. McLean hasn't testified about this, so it is just you now. On June 28, 1966, how did you put up that light frame, from the roof or a ladder?

A I don't remember.

Q And then you were on here and you were going to

604 a

jw-1f-278 Linfante-Cross

put in the light -- oh, here's a chalk -- and the light fits right in here, sir, right?

A Yes.

Q Like this?

A Yes.

Q Right?

A Yes.

Q Just like this. And then you put a screw here that goes right down over it, right?

A Yes.

Q You did all this and that is the way you were going to do it that day?

A Yes.

Q From here to here is 30 inches, sir?

A Yes, about.

MR. DUBROWSKI: Thank you.

I say I am not the world's greatest, probably the worst, but I think I explained it.

THE COURT: You might get quite a price for that in the market.

MR. AUSUBEL: Grandma Moses.

MR. DUBROWSKI: Thanks.

Q Sir, going back to the time in 1970 you were there and you heard Mr. McLean testify to certain questions and you

agreed with all except one?

A Yes.

Q You remember page eighteen, sir, line 22, you remember Mr. McLean being asked this question and giving the following answer:

"Q You knelt not on the roof itself but on the overhang where the fascia was. Is that what you mean?

"A Yes."

Do you remember giving that answer to that question, sir?

THE COURT: Do you remember hearing that answer?

THE WITNESS: I don't remember, no.

THE COURT: He doesn't remember.

Q All right, page nineteen, line two:

You were in the same room with him, weren't you, sir?

THE COURT: He said he doesn't remember now. How in God's name do you expect him to?

Q Sir, before taking the stand did you see this examination before trial?

A Yes.

Q And you read it and looked it over before taking the stand?

A Some, yes.

THE COURT: The thing important is not whether you remember it. Do you agree with the statement?

THE WITNESS: Your Honor, what is the difference because I hear --

THE COURT: Listen to it now and do you agree with it.

Q "Q You knelt not on the roof itself, but on the overhang where the fascia was. Is that what you mean?

"A Yes."

Do you agree with that?

THE COURT: Do you agree with that statement whether you heard it or not?

THE WITNESS: No, because he must have misunderstood someplace because we never do it that way.

Q And Mr. McLean was wrong on --

THE COURT: Don't characterize somebody else's testimony.

MR. DUBROWSKI: All right.

Q Page nineteen:

"How far out onto the overhang did you kneel?

"A I would say about halfway. We put our weight down and then we kneeled there and we have the lights in front of us and when we lift it up, we just leaned over and put it into the tracks."

Do you remember that, sir?

A Yes.

THE COURT: Do you agree with it?

THE WITNESS: I would say yes, because all the top corrugated is 40 inches. When he say about 20 inches, he say about, meaning from back about 20 inches was closer. I don't remember when he tell it, but was pretty close. That's why I said yes.

Q Page 40, line seven:

"Were both of you kneeling out on the overhang about a foot and a quarter out from the face of the building when the accident happened?

"A Yes."

A How much was it?

Q A foot and a quarter out from the face of the building. Do you remember that question and that answer, sir?

A I don't remember.

THE COURT: You heard it now. Do you agree with it?

THE WITNESS: No, we never was put in from --

Q Page 45, line ten: do you remember this question being asked of Mr. McLean --

THE COURT: He doesn't remember. Don't ask him.

608 a

jw-1f-282 Linfante-Cross

Q "Q Let us get something straight. I asked you any part of your body back from the roof of the building, not about the overhang.

"A I said only about the feet.

"Q And the rest of your body was on the overhang?

"A Yes."

THE COURT: Do you agree with that statement?

A Parts of the feet, yes, sir.

Q Same page, line 20:

"Q How far from the edge of the building was the firring strip?

"A About fifteen inches. We put it about halfway between here and there so we can kneel on it to distribute the weight because of these brackets underneath. It will go from one to the other."

Do you remember that, sir?

A Yes. I say yes, because when we refer to the edge of the building, the in edge or the outside, the fascia -- the face of the building or the inside part, it is the edge, too. That is why I say yes.

MR. DUBROWSKI: The other question was repetitious. That is it, your Honor.

FURTHER CROSS EXAMINATION

gw-1f-283 Linfante-Cross

BY MR. HAUT:

Q How many inches was it from this point to the other end of the roof?

A I would say about twelve.

THE COURT: That would be from the face of the building to the back of the --

THE WITNESS: Yes, approximately twelve inches.

MR. HAUT: Thank you. I have no further questions.

MR. AUSUBEL: I have no redirect, your Honor.

THE COURT: All right.

(Witness Excused)

(Recess)

(After recess)

MR. AUSUBEL: Your Honor, in accordance with our stipulation of yesterday, it is stipulated amongst counsel that Mr. McLean's hospital bills and doctors' bills total $1,883.75, and Mr. Linfante's hospital bills and medical bills total $1,591.71.

I would now ask your Honor to take judicial notice in accordance with the life expectancy tables of the Department -- of the United States Department of Health, Education and Welfare, Public Health Service, National Center for Health Statistics, that the reasonable life expectancy of Mr. McLean as of his current age of 63 is 14.2 years and

* * *

jw-1f-289

MR. AUSUBEL: In any event essentially what my position was, and if I am incorrect, then, of course, I understand your Honor's position with regard to it, I understand that they were the owner of the premises and unless they had an absolute responsibility to the plaintiff I understand the evidence is up to this point that they were not in control, but rather that Gulf was under a long-term lease, and maybe it is a question as to whether Mr. James -- the James Corporation was likewise in control with Gulf, and unless there was an absolute responsibility there is no further evidence that I have against the owner.

THE COURT: I may be in error, but I am not in doubt, there is no absolute responsibility. Unless somebody else has any arguments.

MR. FUREY: Your Honor, I don't believe there is a prima facie case against the owner here. I don't believe there is a prima facie case against anybody.

THE COURT: I am not surprised that you take that position.

MR. FUREY: What I was going to say, your Honor, with regard to the owner Gulf is in no worse position and in view of the situation I would think, your Honor, unless the case is going to be dismissed against everybody it should not be dismissed against anyone at this point.

jw-1f-290

THE COURT: I don't think that follows. The case against Gulf is quite different. I will grant that motion.

MR. BRILL: At this time, in behalf of the defendant Joseph James, Inc., I move to dismiss the complaints on the ground the plaintiff has failed to prove a cause of action against the defendant. There is not any proof that there was any control or anything that this defendant did in relation to the work. As a matter of fact, one or two of the exhibits which were offered by the plaintiffs themselves would indicate that the plaintiff, that this franchisee was was not responsible for the structural conditions and that was to be passed by his lessor, Gulf. This was conceded on the opening. For that reason I submit the complaint should be dismissed against the defendant Joseph James here.

THE COURT: You are talking for Joseph James, Inc.?

MR. BRILL: Yes, your Honor.

THE COURT: Unless someone can show me something, I don't see any evidence against Joseph James, Inc.

MR. FUREY: Your Honor, I think we are in the same situation here. We have real property. There are three defendants here who have an interest in that real property. We have the owner, we have Gulf as a lessor and James as the lessee.

THE COURT: Gulf is in control. That is the

jw-lf-291

difference.

MR. FUREY: Gulf is not in control. The lessee is in control, James.

THE COURT: Let me see the lease. The lessee had nothing to do with this that was called to my attention. Is there anything in the lease that makes them liable despite the fact they had nothing to do with it?

MR. FUREY: Yes, indemnification aside from the fact of liability.

THE COURT: What does the indemnification say? Let me look at it.

Which clause?

MR. FUREY: Judge, before we get to the indemnification part, your Honor, with regard to the common law situation, the claim here as I understand it, if there is any claim at all, was that there was a defect in the building. James was in control of the building and the evidence in the examination before trial is that if there was any problem, and in fact there had been a problem with the roof sometime previously, it was up to him to call Gulf.

THE COURT: I am not talking about the examination before trial. I am talking about what is in the evidence before me. There is nothing in the evidence before me.

MR. FUREY: There will be on my case.

jw-1f-292

THE COURT: Well, this is the plaintiffs' case. James is not -- or is he -- is there a cross claim against James?

MR. DUBROWSKI: Yes, sir.

MR. FUREY: The evidence at this point --

THE COURT: Wait a minute. Is there a cross claim against James?

MR. FUREY: Yes. The evidence at this point as far as the complaint against James is concerned is that James is in possession of the gas station.

THE COURT: But it's quite clear he had nothing to do with what happened.

MR. FUREY: He is in possession, he is in control.

THE COURT: I understand, but the contractor got his instructions from Gulf. There is no evidence whatever that Gulf ever consulted James. There must be some provision in this lease giving Gulf the right to do that. Or was Gulf a trespasser in the premises?

MR. FUREY: I think that is more or less beside the point, your Honor. Obviously the United Porcelain employees were there for the benefit of James.

THE COURT: They were there at Gulf's instructions. Was Gulf a trespasser on the premises or was there something in the lease that gave Gulf the right to do this?

jw-1f-293

MR. FUREY: I haven't looked at the lease.

THE COURT: That is the issue here. There is nothing to indicate that James opened its mouth in the whole thing. Therefore, Gulf must have had a right to do this or Gulf is a trespasser. Where is James in control as far as this work is concerned?

MR. FUREY: As much in control as Gulf was.

THE COURT: As far as the evidence before me the first time James knew this was going to happen was when somebody showed up with some material.

MR. FUREY: Right.

THE COURT: I assume Gulf had the right to do that without consulting James. Therefore, I assume James was not in control, or else they should have called the police.

MR. FUREY: I submit, your Honor, under the law of New York in Cullins versus Getts, the mere occupation --

THE COURT: In the absence of evidence to the contrary. The evidence before me is that James never heard of this, that his landlord sent these people in and the first thing they heard about it was when it arrived. You show me a case under those circumstances that say the tenant in possession is liable for what happened and I will be surprised.

MR. FUREY: Well, I don't have the citations in front of me, your Honor. I can have them Tuesday morning. But

jw-1f-294

604

under the cases which follow, Cullins versus Getts, a minimum amount of contact is sufficient to make out a case of control, Boryko, B-O-R-Y-K-O against Bay Ridge, is one which comes to mind, Lafrado versus Bush, another case.

THE COURT: If you represent to me there are cases that can hold James in on this evidence I will reserve decision on this point.

MR. FUREY: He is in on the indemnity agreement.

THE COURT: I don't think so. Let me read it. Where is it? This is the damnest indemnity agreement I heard of. But that wouldn't be the plaintiffs' case. I would still be entitled to dismiss it on the plaintiffs' case, indemnity agreement or not.

MR. FUREY: Then he would remain as a third party defendant under the indemnity agreement.

THE COURT: Let me read it. Because if it shows it in this I want to show it to my former partner, because it is a honey.

MR. FUREY: Can I read it now?

THE COURT: Show it to me. I have it in front of him.

MR. FUREY: Clause number seven, the agreement between Gulf Oil and Joseph James.

THE COURT: Unless you find me a case to the contrary,

jw-1f-295

I would read that in view of the fact this is on Gulf Oil Corporation form, and in view of the fact that this lease is known and intended to be for the operation of a gas station, I will read that to except the situation in this case where Gulf without consulting the lessee went in and for its own purposes -- what was the length of this lease?

MR. FUREY: The period of time, your Honor?

MR. BRILL: One year.

THE COURT: One year. I would not read that as covering the situation.

MR. FUREY: Has your Honor read the case of Levine against Schone?

THE COURT: I have, but it seems to me it has nothing to do with this situation. As I say, I may be in error, and that is why we have got three wise men up there to set me right, but I am not in doubt. But I will reserve decision if you bring a case saying that the plaintiff has a case against you. Obviously you have an interest under the Doyle case in keeping him in.

MR. FUREY: Your Honor, at this time I would like to move on behalf of Gulf, although with not too much optimism in view of what happened with that.

THE COURT: I am going to deny it to make your record.

jw-1f-296

MR. FUREY: I think under the circumstances there certainly has been no proof of notice to Gulf of any defective condition. There has been no proof of any dereliction under the labor law. As a matter of fact, the case of Wright, the case which follows it, it particularly exonerates the owner under the circumstances. I move further that these plaintiffs are guilty of contributory negligence as a matter of law. I move on the further grounds, your Honor, that obviously in this situation they were using the overhang for the purposes of a scaffold which was improper and which would hold them responsible.

THE COURT: On all the ground except the first, I deny the first, and reserve decision.

Off the record.

(Discussion off the record)

MR. ADELMAN: As far as I am concerned, there is one thing that should be tidied up. L.P.W. has a cross claim against Gulf which I think is false as a result of the dismissal of the plaintiffs' case and that has to be disposed of, I think.

THE COURT: You made a cross claim against Gulf?

MR. ADELMAN: Only if there is a recovery against us.

THE COURT: That automatically falls.

MR. ADELMAN: Yes. So I take it that will be

jw-lf-297

dismissed for that reason?

THE COURT: Right.

MR. ADELMAN: Then I can leave, your Honor?

THE COURT: I held you here for my pleasure as long as I can.

MR. ADELMAN: Thank you very much.

MR. BRILL: Would your Honor take a moment now to look at this.

MR. AUSUBEL: I haven't had a chance.

THE COURT: Is Gulf resting then?

MR. FUREY: No, your Honor, I have a witness to call.

THE COURT: Are we ready for the jury then?

MR. FUREY: Yes.

(Jury present)

MR. FUREY: Mr. James.

J O S E P H J A M E S, called as a witness on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FUREY:

Q Mr. James, back in 1966 you were the operator of a gas station?

A Yes.

Q And sold Gulf products there, is that right?

A Yes.

Q And you were in there as a sublessee of Gulf Oil, is that right?

A Yes.

MR. BRILL: If your Honor please, I have to object to that because I think it is the state of the pleadings in the pretrial order that Joseph James, Inc., that was the lessee.

THE COURT: All right, your company.

Q Your corporation was operating the gas station, is that right, sir?

A Yes.

Q Did there come a time when some men came to your gas station to put up the portion of an overhang?

A Yes, sir.

Q Before that, had you had any discussions with anybody about what was to be done there, Mr. James?

A No, sir.

Q Did you talk it over with anybody from Gulf?

A Would you mind explaining that for me, please?

Q Yes, did you have any conversations with anybody from Gulf about having this porcelain job done on the gas station?

jw-1f-299 James-Direct

A No, it was supposed to have been done when I took the building.

Q And from time to time did you mention to the people from Gulf when are you going to come around and do this job?

A That is true.

Q Who did you talk to, sir?

A I forget his name, but he is a manager.

Q A Gulf manager?

A In the Bronx.

Q Did you talk to this gentleman on one occasion or more than one occasion?

A Well, it was promised to me when I took the building and he kept putting it off and putting it off so I told him that I was not going to continue my franchise if they didn't fix the building up. The building was in a run-down condition.

Q And eventually, sir, they did send somebody down to take care of this thing?

A Yes.

Q Did you see anybody measuring up to this job at any time?

A No.

Q Did there come a time when you saw Mr. McLean and Mr. Linfante come to your station?

jw-1f-300 James-Direct

A When I seen them they were actually working on the station.

Q What were they doing when you first saw them there?

A Putting up brackets across the front.

Q And were you advised that this was pursuant to the job that you had asked Gulf to do?

A No, they didn't advise me of that. All they told me that they were sent down by Gulf. I had asked them what they were doing on the property. I think the big fellow showed me a piece of paper saying that they were sent down by Gulf.

Q Now, sir, did there come a time when an accident occurred to these two gentlemen?

A Yes.

Q And would you tell us just before this accident occurred did you see Mr. Linfante and Mr. McLean there?

A Yes.

Q Where did you see them?

A On the scaffold.

Q When you say scaffold, what do you mean?

A Well, on the overhang.

Q Would you describe as well as you can just where you saw them on the overhang?

A Well, I don't know by name, but the little fellow was

jw-1f-301 James-Direct

bending over on his knees like and he was reaching over like this doing something under here. The big fellow was on the roof and the little guy turned like this, like to reach for something and he came out to give it to him and that is when the whole thing fell down.

Q At the time that they were down, were they both completely out on the overhang?

A They were both out --

MR. AUSUBEL: Objection, completely suggestive of the answer.

THE COURT: Where were they, sustained.

A Out on the overhang.

Q Was any part of the body out on the overhang?

A Mr. McLean, the big fellow, both of them were out on the overhang.

Q Completely on the overhang?

A Yes, sir.

MR. FUREY: That is all.

CROSS EXAMINATION

BY MR. BRILL:

Q Mr. James, do you remember when you signed a lease --

A No, I believe it was 1965. July, I think.

Q Did you talk with anyone representing Gulf about work to be done on the gas station before you signed the lease?

A Yes.

Q After the lease was signed, did Gulf have anything to do with maintaining or servicing the equipment on the gas station?

A That was their job. They are supposed to keep it up, all the equipment, everything. You couldn't call anyone from the outside to do any work.

Q I'm sorry, I couldn't follow.

A Gulf did all the work.

Q Were you consulted at any time by Gulf or anybody else about installing an overhang and new lights?

A No, no. The discussion I had with Gulf about the beautification of the building was to put the porcelain on the building and new pumps. Now, I didn't know anything about overhang.

Q Your discussion was limited to new porcelain?

A I was promised new pumps. When I took the station I was supposed to have -- January 1st I was supposed to have new pumps, period.

Q Was there any discussion about installing lights on an overhang?

A I needed lights inside. They didn't put any there.

MR. BRILL: No further questions.

FURTHER CROSS EXAMINATION

jw-1f-303 James-Cross

BY MR. DUBROSKI:

Q Mr. James, you say you saw the two men on the overhang?

A One was out on the overhang.

Q Which one was out on the overhang?

A I think it was the little fellow.

Q What was he doing?

A He was bending over almost on his knees, I think, like this, underneath like this, and he reached back like this -- I was standing right by the pump -- he reached back like this to get something from the other guy and apparently he couldn't get it without coming out and he came out on --

Q When he came out, how did he come out?

A He stepped up on the thing like this and walked out.

Q Walked out?

A Yes.

Q Standing up?

A Yes, standing up. The big guy was standing up, the little guy was squatting down.

Q And the big guy walked out on the overhang?

A Yes.

MR. DUBROWSKI: That is all.

FURTHER CROSS EXAMINATION

jw-1f-304 James-Cross

BY MR. AUSUBEL:

Q Now, Mr. James, first you said you took possession of this service station in 1965, is that correct?

A As far as I can recall.

Q And I think the written agreement indicates it was July 1, 1965, is that correct, sir?

A It is pretty close, yes.

Q I see. At that time when you took over the service station, you had some conversations with the manager of the Gulf people?

A The Bronx manager.

Q And at that time did you complain to him that the service station was run-down?

A Yes. When you say run-down, I mean in the terms of the other stations it looked very bad because this station had no facing on it.

Q Now, at that time when you complained about the service station being run-down, from that point up until the time of this accident did you ever go up on the roof to check the condition of the roof or the coping?

A No.

Q Did you ever see during that same period of time between July 1, 1965 and the time of this accident anybody from Gulf go up on this roof to check the condition of the

jw-1f-305 James-Cross

roof or coping? Just yes or no.

A No.

Q Did you ever see any architect go on top of that roof at any time before this job was undertaken? Just yes or no, please.

A No.

THE COURT: Do you know an architect when you see one?

THE WITNESS: Well, I imagine he's a human being.

Q Let me ask you this: did you see anybody on behalf of Gulf --

A I saw no human being going up on the building, sir.

Q Following this accident, did you see some police officers at the scene of the accident?

A Following the accident, yes.

Q Did you ever give your name as a witness to any of these police officers? Just yes or no.

A No.

Q Sir?

A No. Not that I recall. I might have, because I was the owner of the station.

Q Let me ask you this: do you have any distinct recollection -- there were a number of police officers -- do

jw-1f-306 James-Cross

you have any distinct recollection now as having told any police officer that you were a witness to this accident?

A No, sir.

Q As a matter of fact, before you came down here today was it ever your recollection that these two men were working on the roof and the overhang at the time of this accident?

A I picked the little guy up myself.

Q No. I am asking was it ever your recollection that at the time when this accident occurred that these two men were working on the roof and the overhang?

A You mean did I see them working on the roof and the overhang?

Q Was it ever your recollection that just before the accident occurred that these two men were working on the roof and the overhang?

MR. BRILL: If your Honor please, I object.

A I don't know --

MR. BRILL: Just a minute. I object to the form of the question.

THE COURT: The form of the question is kind of confusing. Ask him whether that happened.

Q Did you see the men just before the accident happened partially on roof and partially on the overhang?

A No. I saw one man on the roof and one man on the

jw-1f-307 James-Cross 617

overhang.

Q Let me ask you this: do you remember that you appeared for an examination before trial back on April 30, 1970?

A Yes.

Q And do you remember in this examination before trial after you went through the swearing in that you were asked this question at page eleven, line twenty:

"Did you see the men as they worked partially on the roof and partially on the overhang?

"A Yes, sir."

Did you give that answer to that question on that occasion?

A I imagine I have.

MR. FUREY: Objection, this is not inconsistent with what he testified to.

THE COURT: Overruled. You gave that answer to that question?

THE WITNESS: As far as I recall, I did.

Q As far as you recall that was the truth?

A Yes, both of them are the truth.

Q On the day this accident occurred, was your service station in operation?

A Yes, sir.

jw-1f-308 James-Cross

Q Had it been inoperation during the time that these two workmen were on the job site?

A Yes, sir.

Q Cars were coming in and going out?

A Cars were coming in and going out, but not where they worked.

Q I understand. But the service station was in operation, is that correct?

A Yes.

Q And you were pumping gas, were you not?

A Yes, sir. I was not pumping gas.

Q Sir?

A The question was: was I pumping gas?

Q Yes.

A I was not pumping gas, no.

THE COURT: But gas was being pumped?

THE WITNESS: Gas was being pumped, yes, sir.

Q When you saw these men come down, did you see the coping come down?

A The whole hanging that they put up, just came right down.

Q I am asking you, did you see cement other than the overhang coming down?

A About three bricks.

jw-1f-309 James-Cross

Q Three bricks?

A They were all right together, cemented right together, laying by his foot.

Q And when you talk about three bricks, you are talking about three bricks from the top of the wall, is that correct?

A I am talking about three bricks.

Q I understand. What were the dimensions of the three bricks that you saw came down?

A Regular size brick, about eight by three and a half, something like that.

Q Eight inches by three and a half inches?

A Something like that.

Q Didn't you see the whole top of that section of the wall came down?

A I didn't see that.

Q You didn't see that?

A I didn't see that, no.

Q You didn't see these pieces come down at any time after the accident?

A I told you I saw three bricks cemented right at the gentleman's leg.

THE COURT: Which fellow?

THE WITNESS: The little fellow. The other one was

jw-1f-310 James-Cross

up on top laying on his back. He thought his back was broke.

Q Now, did you see how far in that overhang went before the accident happened?

A How far it went in?

Q Yes. Did you ever make an observation before this accident?

A The overhang was over like this. This is the overhang.

Q Yes. But did you see how far on the building side it went?

THE COURT: There is a confusion in terms.

THE WITNESS: I don't know what he means. I thought the overhang was the lip over.

THE COURT: Yes, the ordinary meaning is that. But the others use it differently.

Q How far above the level of the overhang was that roof?

A I would give a guess. I would say fifteen or twenty feet.

Q For how long before this accident were the men working on the station?

A Maybe a couple of days.

Q What is a couple of days to you?

A Two days or three days, a couple of days.

Q And did they -- the station appear to be improved after they came down to do this work?

MR. BRILL: Objection.

MR. AUSUBEL: Withdrawn.

I have no other questions.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. FUREY:

Q Mr. James, when you took possession of the gas station, did you agree to examine the premises and were fully familiar with the premises, buildings and fixtures?

THE COURT: It is leading. The answer is yes.

Q And you did check over the premises before you took possession of them, is that right, Mr. James?

A I checked the equipment, not the premises.

Q You checked the building to see if it was in good shape?

A I checked the equipment, not the building.

Q You didn't check the building?

A I wouldn't know if it was in good shape or not if I saw it.

Q Did you look at it?

A Yes, I didn't like the facing of it, I didn't like the way it looked and this is the reason --

jw-1f-312 James-Redirect

Q You are talking about appearance?

A Appearance, yes.

Q You were questioned by Mr. Ausubel concerning your testimony on an examination before trial which took place back on 1970. Did you also give these answers to those questions, Mr. James, back in that time -- page fourteen, line eight --

"Q In the course of their work, did you see one of these men go onto the overhang and then another join him there?

"A Let me ask you one question at this time. You asked me did I see a man on the overhang?

"Q Yes.

"A There was a man on the overhang.

"Q You didn't see the other one join him there?

"A Another man joined him there very shortly.

"Q Were they standing upright or lying down?

"A One was down and one was up.

"Q You don't know which was which?

"A The big man was up and the little man was down.

"Q As I understand you, you said one of them seemed to be inserting a light at the edge of the building?

jw-1f-313 James-Redirect

"A This is merely an assumption.

"Q Yes.

"A The little fellow actually -- the big fellow threw something and he reached back for it. That is when the big fellow came on.

"Q Did you say anything to either of them at that time or at any time just before something happened?

"A I don't recall.

"Q What did you see happen after the two men got on the overhang?

"A Fell (Indicating)."

Did you give those answers to those questions then?

A Sounds like my words, yes.

MR. FUREY: That is all.

THE COURT: Any further questions, gentlemen?

MR. BRILL: No, your Honor.

MR. DUBROWSKI: No, your Honor.

THE COURT: All right. You may step down.

(Witness Excused)

MR. FUREY: Defendant Gulf rests, your Honor.

THE COURT: Everybody rests?

MR. HAUT: Your Honor, we have certain motions.

THE COURT: I know, but no evidence.

MR. HAUT: There may be some evidence on the part of

jw-lf-314

Beaman.

THE COURT: Ladies and gentlemen, you may have another short recess while I exercise my constitutional obligations.

(The jury left the courtroom.)

(In open court without the present of the jury)

MR. HAUT: Your Honor, all the case is in with respect to plaintiff and defendants and at this time we have rested.

At this time, I would like to renew my motion --

THE COURT: I will tell you what's wrong with your argument, not to cut you off, but tell you what to direct yourself to. It seems to me the jury could find from the evidence before us that your client failed to give them proper instructions on how to act and, therefore, you are negligent.

MR. HAUT: The liability has to flow through Gulf.

THE COURT: The jury in my view can find they can disregard the testimony of the last witness. Offhand, he struck me as quite believable, but that is their problem. They can disregard the testimony of the witness or they can accept the testimony of this witness and conclude that on the basis of the instructions these people got from you they were guilty of no negligence. But you were guilty of negligence in

jw-lf-315

not instructing them properly.

MR. HAUT: Your Honor, we are not a primary defendant.

THE COURT: I don't care what you are. These people are only negligent if they didn't act according to how a reasonable man in their circumstances would have acted.

MR. HAUT: Your Honor --

THE COURT: May I finish? I haven't finished my argument. Listen to me first. As I view it, negligence means these two men didn't act as reasonable persons in their positions would act. It seems to me the jury can find in view of the instructions they got from their employer they were acting in a reasonable, prudent way according to their craft and that the negligence was yours. Now, that's what I think. Now, you argue against it.

MR. HAUT: Even if your Honor is correct --

THE COURT: Which is a big assumption.

MR. HAUT: No, assuming that your Honor is correct, I am jumping headfirst in, and if your Honor is correct, let's assume that your Honor is correct, yet the liability can't flow from the plaintiffs to the third party defendant directly. It has to flow through Gulf. In other words, there has to be a violation of duty on the part of Gulf to the plaintiffs. There is no duty. That's in all the other cases. Gulf can't

jw-lf-316

be liable by virtue of our negligence in the work.

THE COURT: Of course they can't, but they are liable -- I am not saying that the jury is going to find negligence. The jury can find that Gulf was negligent in not -- which would entertain a motion to set aside such a finding is beside the point here -- the jury can find Gulf was negligent in not notifying the laborers who were business invitees on their premises of this danger.

MR. HAUT: Of the defect in the premises, the coping?

THE COURT: Of the defect in the premises. That makes Gulf liable to them. Now, if you were negligent in not giving them proper instructions how to deal with this situation, you would be liable to Gulf.

MR. HAUT: Your Honor, may I say this then -- so we posited that Gulf's libility is from a defect in the premises.

THE COURT: That's right.

MR. HAUT: There must be some defect in the premises before we even talk about it first.

THE COURT: That's right. But that doesn't mean you have an obligation to Gulf as a subcontractor to see that third people take steps to remedy these details.

MR. HAUT: Here, sir, we have two workmen who are the

jw-lf-317

only workmen on the premises. They are experience workmen who have done this on numerous occasions.

THE COURT: It is an excellent jury argument. But the jury can find that in light of the stupid instructions you gave them --

MR. HAUT: It is not stupid.

THE COURT: I am not saying it is stupid. They testified to instructions that your people told them by which to get out on that parapet. The jury might find that is very bad instructions they were following.

MR. HAUT: If they are liable, it would be contributory negligence.

THE COURT: It would not. To be contributory negligence they would have to be negligent as a reasonable, prudent man in their circumstances. Their circumstance includes instructions from their employer which they are entitled to rely on. That would make them not negligent and you negligent.

MR. HAUT: I won't go further.

THE COURT: The Court of Appeals might disagree with me.

MR. DUBROWSKI: Your Honor, I think I am in a unique position here because Gulf has a claim against me because the work was improperly done.

jw-1f-318

THE COURT: No, their claim against you is that you authorized plans which on their face were dangerous. The only sensible thing which this so-called, in my view -- in your view it might be different -- the only sensible thing that this so-called expert on buildings who came from Florida said in his whole testimony was that this coping was no part of the structure, was just an architectural ornament placed on top. Now, that was not challenged by anybody, and as I say it was the only sensible thing he said as far as I am concerned in his whole testimony. The drawings produced by the architect show on their face that this ornamental piece of coping is being used as a weight-bearing element. I don't know much about architecture but that to me is absurd, and you people with the architect as -- the architect's drawing with your imprimatur on it and accepting your general contractor and this character from Florida as a general contractor, he, looking at those plans knowing it was an ornamental piece of structure, should have known it was a thing of danger.

MR. DUBROWSKI: Except I had an architect do it, not a contractor.

THE COURT: That's your problem.

MR. DUBROWSKI: That's not my problem.

THE COURT: Where a piece of paper is presented to

jw-1f-319

you and you're a general contractor, I think the jury can find -- you are in a different position than Gulf, there is no evidence that Gulf ever saw it.

MR. DUBROWSKI: No evidence I ever saw it.

THE COURT: Your name is on it. The jury can find from your name being on it that you saw it.

MR. DUBROWSKI: Oh, yes.

THE COURT: The jury can find from your name being on it that you saw it and from this expert's answer I think the jury can find that a reasonably intelligent architect contractor should have seen that that was a faulty drawing.

MR.DUBROWSKI: Your Honor, my recollection of that drawing was that it didn't show any coping on it whatsoever.

THE COURT: It looks like coping to me.

MR. AUSUBEL: It shows the thing goes right to the top without specifically denominating coping. It is right here, your Honor.

MR. DUBROWSKI: My recollection is it doesn't show any coping, period, it just shows brick. There is no marking or anything.

THE COURT: There is coping there.

MR. DUBROWSKI: From his testimony I believe he admitted there was no coping shown in the sketch.

THE COURT: All right. You don't have to make a very

jw-1f-320

careful examination. You are presumed to know the nature of the building when you are going to put things on it.

MR. DUBROWSKI: All I did was provide the materials.

THE COURT: I understand you made the contract with Gulf and Gulf had no contract at all with --

MR. DUBROWSKI: But in my contract with Gulf, I was going to identify it for any damage in connection with such work.

THE COURT: This is damage in connection with such work.

MR. DUBROWSKI: If the plaintiffs looks we have no problem.

THE COURT: I quite agree.

MR. DUBROWSKI: If the plaintiff wins, it doesn't have anything to do with their work, if they win it means they did the work properly.

THE COURT: It does not mean they did the work properly. I just explained that to your colleague. It means that they in light of the instructions they got from their employer acted in a reasonably prudent manner. It doesn't mean they did their work properly. You keep on saying that, but that is not what the evidence is now. We have testimony from which it can be inferred that the person from whom you subcontracted gave these people instructions which were suicidal.

jw-lf-321

MR. HAUT: I don't see that in the evidence.

THE COURT: I did. I don't know what you were doing here when it was coming in.

MR. HAUT: Where can you put to evidence that we gave instructions that were suicidal, sir?

THE COURT: Instructions they got from their boss they said they were following when they came out on the parapet.

MR. HAUT: They said they weren't out on the parapet.

THE COURT: Not as far out on the parapet as Mr. James said, but they were far enough on the parapet to make it a highly unlikely place to be in light of the fact that the parapet was attached to an ornamental --

MR. HAUT: There is no testimony to that effect.

THE COURT: There is testimony. You can see from the pictures.

MR. HAUT: They said they were over the coping portion.

THE COURT: No, they didn't. If you read their examination before trial which the jury is entitled to accept they were halfway up. And if you read the testimony they give as to their instructions, you will see that the instructions were wrong.

MR. HAUT: There is nothing in the instructions they

jw-lf-322

could go halfway out or any distance out.

THE COURT: They said they followed what their instructions were.

MR. HAUT: The difference is here testifying at the trial here is that they are testifying they are over here on the coping portion and they testified at this trial here that they didn't go further out and they didn't see their instructors go further out.

THE COURT: No, then they accepted their -- this is a very beautiful jury argument, but the net of the testimony is, if the jury believes them, I say that they were following the instructions they got from you people. They said at least ten times that they did this job exactly the same way as they did all other jobs and did this job exactly the way these people told them to do it.

The argument that this isn't true is another question.

MR. AUSUBEL: Excuse me, I don't mean to abbreviate the argument.

MR. DUBROWSKI: I am abbreviating it right now.

MR. AUSUBEL: In light of your Honor's suggestion about enlarging the photographs, I would like to give to the manager from Alfred H. Miller Company, if you will permit me, to release these four photographs which are marked as Exhibits 14D, H,G in evidence to make photographs so they can mark them.

jw-1f-323

THE COURT: Do you have any further arguments?

MR. DUBROWSKI: I can see how the wind is blowing and any further argument would be wasting time.

THE COURT: There is no law against that.

MR. DUBROWSKI: Yes, your Honor, why waste time.

MR. BRILL: Now that Mr. Furey has rested, I would like to renew my motion.

THE COURT: I don't see any evidence that ties you in.

I would like to hear Mr. Furey.

MR. FUREY: Addressing myself first to the common law question, your Honor, we have a situation certainly Mr. James was as much in control of the premises as Gulf if not more so.

THE COURT: Wait, don't argue that. I will hear that Tuesday morning after you have briefed it. As of this minute, I will grant his motion. But if you show me the cases to support the argument which I know you are going to make, I am not trying to cut you off, I know exactly what you are going to say, and I disagree with you, but I don't make the law.

MR. FUREY: Mr. Brill will still be here Tuesday morning, your Honor, in case you decide --

THE COURT: That's up to him.

jw-lf-324

MR. HAUT: May I add one more point on mine? I think we're overlooking one crucial factor and I will be short and to the point.

It also has to be the proximate cause and I submit as a matter of law the proximate cause of the accident was not where the accident occurred but the coping. I am addressing myself to an issue of law, not of fact. I am saying as a matter of law the proximate cause of this accident was the fact that the coping moved and came down taking everything with them. So that no matter where they would have been --

THE COURT: No, if they hadn't gone out on the end, the coping would have held. The coping was obviously strong enough to keep the thing there because it's been there for sometime. It's been there for a day and a half at least and probably would still be there unless there was a heavy snow.

MR. FUREY: Your Honor, I have one further motion. I would like to move to strike out the testimony of Mr. Leavin relating to the cause of the accident inasmuch as it's based on a premise not based on the proof. Mr. Leavin based his opinion on the premise two plaintiffs were standing on the coping at the time. There is no proof they were standing on the coping at this time. Therefore, the opinion must fall.

jw-1f-325

THE COURT: I won't strike it. If you know it's evidence to be based on, you are much greater than I am.

I will explain that.

MR. DUBROWSKI: Can we take a five-minute break?

THE COURT: Is there anything further?

MR.DUBROWSKI: I may call a witness.

THE COURT: I have to leave here at 4:30 on the dot.

MR. DUBROWSKI: Can you give me a minute to think?

THE COURT: Yes.

(Pause)

H O W A R D G R E G O R Y S P E N C E R, called as a witness on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DUBROWSKI:

Q Sir, will you give us your address, please?

A 101 Gorsuch Road, Lutherford, Maryland.

Q G-O-R-S-U-C-H?

A Yes.

Q Are you employed by Beaman Corporation, sir?

A Yes.

Q How long have you been with them?

A Twenty years.

jw-1f-326 Spencer-Direct

Q What is your position with them?

A At the time of the deposition I was vice president of Beaman Company of Virginia and manager of Beaman Company of Virginia and also manager of Beaman Company of Maryland.

Q What's your position today?

A Well, we have consolidated. It has changed some.

THE COURT: You do the same thing?

THE WITNESS: Yes.

Q Sir, are you an engineer of any kind?

A Yes, I am a graduate engineer.

Q What type of engineer?

A Ceramics.

Q What is a ceramic engineer?

A A ceramic engineer is an engineer that involves in any nonmetallic that comes from the earth.

Q Are you familiar with the overhang which we had involved in this case, sir?

A Yes, sir.

Q I show you Defendants' Exhibit B in evidence, sir, and ask you if any part of this was obtained by Beaman Corporation.

A Yes, these are our plans. The first part is a plot plan which is not ours, this small portion.

Q Yes, sir. How about the second page, small portion?

jw-lf-327 Spencer-Direct

A It could be. It is not identified as being by Beaman, as I see. I don't believe that any of the small pages are identified as being by Beaman.

Q But the big page is, sir, right?

A Yes, sir.

Q That was done by a New York architect, sir?

MR. AUSUBEL: Just a minute. I object to who it is done by as leading and suggestive.

THE COURT: Doesn't it say on the face?

MR. DUBROWSKI: Yes, I believe so.

Q Right in the lower right-hand corner is the name Mitchell?

A Yes.

Q And he's an architect?

A Yes. I do not know him. There is a registered architectural seal on the plan from the State of New York, right.

Q Did Beaman Corporation get that large thing, sir, large part of Exhibit B?

A Yes. We would have drawn this, yes, sir.

Q And would you send it to anybody after it was finished?

A Yes, we would send it to the customer and it would be given in this case to Mr. Sol Casso, his firm.

jw-1f-328 Spencer-Direct

Q Well, Sol Casso, what firm is that?

A United Porcelain I think he was operating under.

Q Who is the customer?

A Gulf Oil Company.

Q Now, sir, this overhang -- was any part of it attached to the top of the brick wall?

A To the very top of the brick wall?

Q Yes.

A No, sir, it should not be.

Q All right, sir.

A When you say top, you are talking about coping?

Q Coping, or whatever.

A Right.

Q What supports the overhang, sir?

A Drive rivets into the wall bracket.

Q Where is this wall bracket?

A Attached to the -- it's fastened to the face of the parapet wall.

Q In your opinion, sir, which would be the best way to put the lights on?

A To install the lights?

Q Yes, sir.

MR. AUSUBEL: Your Honor, I object to that.

THE COURT: I don't see that.

jw-1f-329 Spencer-Direct

Q Let me put it this way, sir.

Beaman Corporation has been selling these overhangs for how many years?

A Perhaps fifteen years and up.

Q Do they sell them to only Gulf or to other stations?

A All oil companies, hopefully.

Q This particular one, has it been sold over a period of time?

A It was sold during a limited period of time. We perhaps did as many as two thousand of those.

Q And you are familiar with the overhang, sir?

A Yes, it is an old system, but I am familiar with it.

Q Are you familiar with all the parts of it?

A Basically familiar with all parts of it, yes.

Q And you are familiar with how it should go up?

A Yes, sir.

Q How should the lights go up?

A The lights should be installed from a scaffold from the front of the overhang.

MR. DUBROWSKI: Thank you, sir. No further questions.

I have one, excuse me.

Q Mr. Beaman, did -- I mean Mr. Spencer, did Beaman Corporation have anybody at this Gulf service station?

A This station had to be managed, yes. A representative of Beaman or of United Porcelain had to measure the station.

Q Other than that?

A Not that I know of, no, sir.

Q Did Beaman deliver the products or material to the station?

A Yes, we did.

MR. DUBROWSKI: Thank you, sir.

MR. HAUT: Your Honor, this may carry over 4:30.

THE COURT: We have five minutes yet.

CROSS EXAMINATION

BY MR. HAUT:

Q Did you, yourself, ever visit this particular location that is the subject of this accident?

A No, sir.

Q Did you have any knowledge as to the type of wall or roof that this building had?

A This particular roof, no, sir, I do not.

Q I ask you to refer to that, sir, and ask you whether there is any indication on that diagram as to whether the top of the overhang is to be level with the top of the wall.

A The top of the overhang is not level with the top of the wall.

jw-1f-331 Spencer- Cross

Q And where is that indicated on the diagram?

A At this point, sir. Here's the top of the wall. Here's the top of the overhang.

Q Now, sir, directing your attention to this right on top, is this part of the overhang or the top portion of the overhang?

A That is a corrugated roof, yes.

Q Does that corrugated roof decking or the extension thereof go over the top of the wall?

A Yes, it does.

Q Is there any indication as to whether there is a coping at the top of the wall?

A This indicates there is a coping.

Q Does it indicate the top of the decking is going over the coping at the top of the wall?

A Yes, it does.

Q Now, sir, you made some statements with respect to the way to put the lights in. Does Beaman erect on occasion these overhangs?

A Yes, sir.

Q And how many years has Beaman been involved in the erection of lights, erection of overhangs of this type?

A Approximately fifteen years.

Q And on these occasions, are you or somebody in your

jw-lf-332 Spencer-Cross

employ on the jobs?

A At times, not all the time.

Q Well, the Beaman workmen are on the job?

A Yes.

Q Are Beaman workmen instructed as to any particular manner to put the lights on?

A Yes.

Q What is the manner that they are instructed in?

A To use the scaffolding to put the lights on the building.

Q Do Beaman workmen ever put the lights onto the roof?

A It is possible, I couldn't answer that.

Q To your knowledge, sir, are they instructed not to put the lights on from the roof?

A No, they are instructed to put it on from scaffolding.

Q Are they instructed not to put it on from the roof?

A No.

THE COURT: Are they instructed to put it from the scaffolding, do you affirmatively instruct them?

THE WITNESS: Yes.

Q You instruct them not to put them on from the roof?

A No.

Q To your knowledge, sir, do the workmen ever put the

jw-1f-333 Spencer-Cross

lights on from the roof?

A I have never seen it done.

THE COURT: You have never seen it done?

THE WITNESS: Yes.

Q Is it possible to put these lights on from the roof?

A I think it is possible.

Q Would you say it is a safe procedure to put them on from the roof?

A No, sir.

Q Now, assuming that the roof is in a solid and sound condition and that the wall is in a sound condition, would there be any problem with safety in terms of putting them on from the roof if the men were standing or kneeling on the coping at the time?

A No, sir, the only problem would be dropping the light itself.

Q There would be no safety problem?

A No, sir.

Q Now, sir, how many years prior to this accident had you entered into any contractural arrangements with United Porcelain?

A I have no idea.

Q But it was sometime?

jw-1f-334 Spencer-Cross

A Yes.

Q Sir, had you ever spoken to people from United Porcelain as to the manner in which these lights are to be installed in the overhang?

A I have not. That was not part of my territory.

Q Whose territory would it have been?

A It would have been under the company operation, a branch operation.

Q To your knowledge, sir, did whoever's territory it was ever speak to United Porcelain and advise them as to what you thought was the proper way to install these lights?

A I would not know.

MR. DUBROWSKI: I object to the form of the question.

THE COURT: He says he does not know.

Q With respect to the territory you covered, did you ever advise anybody with respect to what you thought was the proper manner to put in these lights?

A Yes.

MR. HAUT: That is all.

THE COURT: How long will you be?

MR. AUSUBEL: I have some questions, your Honor.

THE COURT: I was asking the question.

MR. AUSUBEL: I worked all last night preparing for it, so I feel a little frustrated.

THE COURT: You can have as long as you want.

MR. AUSUBEL: May I suggest that perhaps I could, if the witness can come back here on Tuesday --

MR. DUBROWSKI: He has to come back to North Carolina.

THE COURT: I understand, but today I can't stay beyond closing time.

MR. AUSUBEL: Could you come back Tuesday morning, sir?

THE WITNESS: It's possible. I suffered a stroke in November --

THE COURT: How long will you be?

MR. AUSUBEL: I will try to work with as much dispatch as I can, your Honor.

THE COURT: All right. Go ahead.

CROSS EXAMINATION

BY MR. AUSUBEL:

Q Now, sir, you indicated that you did appear for a deposition some years ago on June 19, 1970, is that correct?

A Yes, sir.

Q While you were a ceramic engineer you were asked questions about material Beaman had supplied in connection with the installation of this prefabricated overhang, is that correct?

A Yes, sir.

Q You checked out as to the strength that these rivets, these drive rivets could bear once they were placed into the building, is that correct?

A That's correct.

Q What was the strength of these drive rivets once they were installed in the building in accordance with these plans that you drew?

A A single drive rivet has a shear strength of 2,060 pounds, it has a tensile strength of 2,010 pounds in shear, 1,060 pounds tensile strength. That's per rivet.

Q Assuming that this overhang had been put in on this building, would these various brackets and angle iron supports, would that overhang tend to sustain certain weights on it?

A Yes, sir.

Q What would you say would be the weight load if the building is properly constructed and maintained that this overhang could sustain once it was put in in accordance with the plans that you have drawn?

A Well, it was probably designed for a dead load of 40 pounds and a live load of perhaps 30 or 40 pounds. This is per square foot.

Q Per square foot?

A Yes, sir.

jw-1f-337 Spencer-Cross

Q And how big was this overall overhang on this particular job site?

A Well, the overhang itself is two foot in length -- I mean it's two foot in depth. The overhang itself is two foot in depth from the building line to the line of the lights.

Q What was its length?

A I don't know. Approximately 83 feet.

Q You indicated that you did indeed draw that large diagram which you sent to the customer Gulf and a copy of which you sent to United Porcelain, is that correct?

A That was a Beaman drawing, yes.

Q Before you submitted that Beaman drawing to either United Porcelain or to Gulf, did you ever arrange to have any inspection made of the roof or coping on this premises? Just yes or no.

A No.

Q Now, after you anticipated, according to this drawing, that the overhang would go above and across that coping -- is that correct?

A Yes.

Q You also anticipated, did you not, that in putting up this overhang that work would be done from the roof side. Isn't that a fact?

jw-1f-338 Spencer-Cross

A From the roof side?

Q Yes.

A Some workwould be done from the roof side, yes.

Q You understood when that overhang was going to be put on that certain work was to be done from the roof side, is that correct? Just yes or no.

A Yes.

Q Did you ever provide any scaffolds at this job site for any of the employees of United Porcelain?

A No, sir.

Q Did you ever write to them or suggest to them in writing that they should provide scaffolds to put in the lighting perimeter?

A I have no idea.

Q Did you ever see any such letter or memorandum in your file?

A No, sir.

Q Did you ever or to your knowledge did anybody on behalf of your company ever make any inspections with respect to the manner and methods of doing this kind of work on prior jobs that were done by United Porcelain in connection with Beaman materials?

A We have sent a Beaman inspector to work with United Porcelain on a previous occasion. Whether or not there was

jw-1f-339 Spencer-Cross

one on Gulf's job or not I do not know.

Q After you let out this job, do I understand correctly that at no time did you communicate with United Porcelain and indicate to them that you had not made any inspection of the roof or coping on this building before you sent them that plan. Is that correct?

A That's right.

Q Did you ever advise the Building Department of the City of New York before that plan was submitted that no one on your behalf ever made an inspection of that roof or coping before that plan was filed?

MR. DUBROWSKI: Objection, your Honor.

THE COURT: Wait a minute. Let's hear the objection.

MR. DUBROWSKI: You in this case can either deal with Beaman Corporation, or the architect.

MR. AUSUBEL: I am referring to Beaman Corporation.

MR. DUBROWSKI: Not the architect.

THE COURT: You don't know who the architect is?

THE WITNESS: No, sir, I do not.

THE COURT: You don't know if any Beaman employee ever gave any such advice?

THE WITNESS: I do not. The seals bear --

THE COURT: That's enough.

jw-1f-340 Spencer-Cross

Q Was there any record which you had in your file in connection with this project which indicated that anyone went up onto the roof of this building to check out the coping or the parapet wall in terms of its strength or durability?

A Not for strength or durability. Very possibly on the wall.

Q Was there any record that anybody had gone up onto the roof of this building to check out the strength or consistency of the coping or the parapet wall before you drew up these plans?

A No, sir.

Q As a matter of fact, the man you sent down, wasn't it one of your people who went down to make the measurements and not United Porcelain?

A I do not know.

Q Well, back in 1970 wasn't it your recollection that it was one of the Beaman Corporation representatives that went down to make measurements at the job site?

A This could have been, I do not know.

Q Do you recall at page eighteen, line nine in your deposition -- you went over this, did you not?

A I did.

Q You went over it before today and executed it?

A On the plane.

jw-1f-341 Spencer-Cross

Q "Once you got this order from Gulf Corporation in terms of your general practice before this job of December 9, 1965, did Beaman ever make arrangements to make an inspection of the gas station that would be modernized and renovated?

"A Not inspection. The dimensions of the building would have to be predetermined. In other words, we would have to measure the length and width of the building."

Do you recall being asked that question and giving that answer?

A We --

Q No, I am just asking.

THE COURT: Go ahead and explain.

A We in that context would be either Beaman or United Porcelain, yes, sir, and I don't know which one.

Q As a matter of fact, your first communication to United Porcelain in connection with this job was on June 20, 1966, isn't that a fact?

A I don't know.

THE COURT: Is that relevant?

MR. AUSUBEL: Yes, it is, your Honor, as to who made these measurements.

THE COURT: What difference does it make to your case?

jw-1f-342 Spencer-Cross

MR. AUSUBEL: All right. You are not trying anybody else's case I hope, not at this hour of the night.

Q As far as United Porcelain is concerned, it was not retained to do anything as far as the roof or coping, is that correct?

A That's correct.

Q It was only to provide the labor for the installation that was called for, is that right?

A That's correct.

MR. AUSUBEL: I have no further questions, your Honor.

THE COURT: Anything further?

MR. FUREY: Just a couple, your Honor.

CROSS EXAMINATION

BY MR. FUREY:

Q Mr. Spencer, does the plan you were discussing show the coping?

A Yes, sir.

Q With regard to the coping, does it show whether or not there was to be any attachment to the coping according to those plans?

A That plan does not.

Q Does it show there was not to be any attachment to the coping?

jw-1f-343 Spencer-Cross

A No, sir.

Q It doesn't show one way or the other?

A I don't think it has.

Q Are you familiar with the electric hammer drill?

A Yes, I am.

Q If a hammer drill was used on a coping, is that capable of loosening it?

A Yes, sir.

Q When the measurements were made by the representative of either Beaman or United Porcelain, sir, would the person who made the measurements ordinarily know the problems that might interfere with the work?

THE COURT: How does he know if he doesn't know who made the measurements?

Q Is that the practice in the trade?

A No, we could not pick up structural flaws.

Q If it was noticed, it would be reported, is that right, sir?

A Yes, sir.

Q And you were asked if there was any safety problem with regard to putting in these lights on the roof, sir. Is your answer based upon the assumption that the men stayed on top of the coping?

A It is a very awkward way to do it. That's what my

jw-lf-344 Spencer-Cross

answer would be.

Q Sir, if they actually went out on top of the overhang itself, would there then be a safety problem?

a No, sir.

C Sir, if the drive rivets are not properly installed would that be a safety problem if they stood on the overhang?

A Yes, sir.

Q Sir, when you spoke of a 30 pound live load, if a man is standing upright and weights 180 pounds approximately, how much of a live load per square foot would you have there?

A Depends on the area. Between the two brackets certainly not -- a man standing on the end -- one bracket itself would hold perhaps two people standing on the end of it.

Q If it were properly installed, is that right, sir?

A Yes, sir.

MR. FUREY: Thank you.

THE COURT: Anything further?

MR. DUBROWSKI: Not from me, sir.

THE COURT: All right.

(Witness Excused)

THE COURT: Ladies and gentlemen, ten o'clock on Monday, 10 to noon 28th. It's on the 28th floor. You take a different elevator than you took to come here and just go

into the courtroom and someone will be there to show you the jury room.

Tuesday, not Monday.

(At 4:40 P.M. adjourned to Tuesday, February 19, 1974, at 10:00 A.M., Room 2804.)

rk-1f-345

JAMES V. MC LEAN, et al.
vs.
L.P.W. REALTY COMPANY, et al.

GULF OIL CORPORATION
vs.
BEAMAN CORPORATION, et al.

New York, February 19, 1974
10:00 A.M.

(Trial Resumed)

(In the robing room)

THE COURT: There are certain motions pending. The motion by James to dismiss the cross complaint as against James is granted. All other motions are denied except the motion by United Porcelain as to which decision is reserved.

MR. DUBROWSKI: How about the other motion by Gulf as to any notice of defect. I think you reserved decision on that the other day.

THE COURT: That is denied.

MR. BRILL: Your Honor, there was also a motion made on behalf of James to dismiss the complaint as to James. Your Honor has ruled on the cross complaint.

THE COURT: That is granted, too.

MR. FUREY: Your Honor, just to complete the record at this point, may I respectfully except to the dismissal of the complaint against James on the basis that my rights under Dole against Dow are injured thereby and I respectfully except

rk-1f-346

to the Court's ruling on the cross complaint on the basis of the case of Levine versus Shell 28 New York 2d 205 and at this time, your Honor, I renew my motions which were made at the end of the plaintiffs' case to dismiss the plaintiffs' complaint as against Gulf on the grounds that there is no notice of any defective condition to Gulf, no proof of any notice and there is no proof --

THE COURT: That proof was satisfied by the last witness who testified that the blueprints were submitted to Gulf and those blueprints in my --

MR. FUREY: And on the further ground, with regard to a detail of the work by United, Gulf is not liable under Wright against Belt and the cases that followed and at this time I further move for a judgment on my cross complaint against Beaman.

MR. DUBROWSKI: I join in all the motions except the last one.

THE COURT: Of course Beaman will be submitted to the jury, the question to be determined whether the contract means that they undertook to put up an overhang and do the work properly or they contracted to do properly the specific work called for in the blueprint and I think the jury is entitled to find they did do what was called for under the blueprint.

rk-1f-347

MR. FUREY: Wouldn't that be separate and apart from the question of whether the indemnification agreement --

THE COURT: The indemnification agreement merely agreed that they guarantee to indemnify improper work.

As I indicated, I think you might have an argument for a judgment notwithstanding the verdict providing the jury found that.

MR. DUBROWSKI: By the way, your Honor --

MR. AUSUBEL: Your Honor suggested that I make enlargements of exhibits. Exhibits 14D, F, G, H in evidence, and I have arranged to make the enlargements and I ask that these four photographs be received in evidence to aid the jury.

THE COURT: Any objection?

MR. FUREY: No.

MR. DUBROWSKI: Your Honor, I made a sketch on the board last week and everybody asked me to copy it. I ask that be put into evidence for the jury to look at it.

THE COURT: Any objection?

MR. HAUT: No.

MR. FUREY: No.

THE COURT: That will be Defendant's Exhibit B.

(Defendants' Exhibit B received in evidence.)

THE COURT: The enlarged photographs will be marked

xx

rk-1f-348

14D1, etc.

(Jury Present)

(In Open Court)

THE COURT: The reason for the mix-up in the place, we have three more judges than we do courtrooms and it causes trouble and the courtroom to which we were assigned today would have been all right for today's problems but tomorrow I have to pick a jury in a criminal case and the room just isn't big enough to accommodate that, so they finally decided they would move me today into a room which is big enough so that is why we are here instead of up there. Don't ask me why no one told you.

The delay getting here is part of my continuing obligation to prevent you from being subjected to cruel and inhumane punishment while the lawyers make legal arguments.

We will now hear the summation of counsel and before you now is the case of the plaintiff against Gulf. There were other defendants but they are no longer here, main defendants. That is the first case, the plaintiff against Gulf.

Then there is another case of Gulf over against Beaman and United Porcelain, so you are going to have two lawsuits, or three lawsuits because the rules are different as to each.

rk-1f-349

Sometimes I think it would be better to have the judge first, then the summations, but that is not the way it goes and the lawyers know in general what my charge is going to be and they will sum up against that background and remember, when you hear the various lawyers, you have three problems you have to decide on ultimately. One is plaintiff entitled to a verdict against Gulf and two, if so, is Gulf entitled to a verdict over against either or both of the other two, and I will lay down the rules upon which you decide that and I think you may already have some fulfillment of my promise that the thing will begin to settle down when you find out what it is all about and I hope before the day is over, you will get the completion of that promise.

Proceed.

MR. HAUT: Ladies and gentlemen, good morning. Since I was the last one that had the pleasure of addressing you, I now have the privilege of being the first one.

The job of jurors is indeed a difficult one. I sometimes think to myself how I would react if I was a juror though it is not likely that any lawyer would allow me on the jury, take me on the jury.

It is difficult, I am sure to wade through the maze of inferences and conflicting testimony, but it is something that the jurors have to do. It is a confidence we have

rk-1f-350

lodged in the collective confidence of the community. We are all caught up as lawyers in the litigation and this is perhaps part of the beauty of our adversary system, that there is a client, a lawyer and the lawyer takes on the cause of the client, he becomes caught up with it emotionally and he gets involved in it and he sees everything his own way, everything through the rose-colored eyeglasses of his client.

The beauty of the system, each of the lawyers will take up the cause of their client, but there is a certain measure of enforcement of impartiality. We have his Honor who is sitting here who is impartial completely, then we have you ladies and gentlemen who sit back, not caught up in the emotional responses of the lawyers, not caught up in the problems and conflicts of the clients, but rather sitting back dispassionately weighing and evaluating the evidence.

This reminds me somewhat, and we turn to guidance to the good book and the Bible tells us when the Israelites left Egypt, they thought they were free. Here they were heading towards the promised land and they are approaching the Red Sea and behind them they suddenly notice the Egyptians coming on quickly. The Egyptians change their mind and they are pursuing the Israelites.

The Israelites have the Red Sea before them and behind them the Egyptian army pursuing them and it is indeed

rk-1f-351

a conflict. To go forward, they can't because of the insurmountable barrier of the sea. To go backwards, they can't even if they wanted to which is not even at all clear. If they wanted to go back they couldn't. The Egyptian Army is proceeding. They are caught and they turn to their leader Moses, what shall we do? The Bible doesn't record the exact comment of Moses on this instance but it might have been something along these lines, "My children, you have to walk the straight line. You will have to walk between the armies and the sea. You will have to act in a very, very careful, measured, straight and narrow path and with God's help you will reach the promised land," and I say this is an apt analogy I submit what jurors have to do. They have to walk the narrow path between the maze of inferences, the wealth of contradictory testimony or contradictory arguments. You will hear different lawyers, each one caught up in his own client's position arguing his case which is what it should be, but then you would sit back and impassionately weigh all the evidence.

As you heard before, the plaintiff is not suing United Porcelain, they are not suing us directly, you have heard this from his Honor and from myself. We are being sued by Gulf. In effect what is happening, plaintiff is suing Gulf and Gulf is saying we are denying liability to the plaintiffs,

rk-lf-352

but if we should be liable, then they point a finger to the third party defendant Beaman and United Porcelain and say you are liable to us.

My position in this case, and I suggest and submit on the basis of the total testimony you have heard is the following.

Briefly stated and simply stated, if you find that the plaintiffs were doing their work as honest, hardworking men, working in a competent manner, you have heard the testimony of Mr. Spencer who testified that this overhang was almost strong enough to have two people dance a jig on, this is something that is strong, it could hold men and these people were working as they have worked many, many times before. Mr. Linfante testified approximately 25 and Mr. McLean approximately 75 times without any incident whatsoever. They are working on this, they have done this method many times before. If you find that they are free from negligence, contributory negligence and they are entitled to a verdict against Gulf, then I submit that this should and will in your minds completely exonerate United Porcelain from any liability because of these very facts. There are only employees on the premises. There is nobody else there from United Porcelain. If they are free from any liability, if they are free from any negligence which would stop them from being

rk-1f-353

liable, from recovering, if they are free from contributory negligence which would prevent their recovery, by that same token, it follows as day follows night that their employer who was only there through these two hardworking men who were doing their job is similarly free from any negligence and any liability to Gulf whatsoever.

I suggest, and I feel very strongly for my own personal opinion but whatever that counts for, again, that there was a very, very strong case made out that the plaintiffs are doing their work properly. The substance of all the testimony and the last witness you heard, it makes out a powerful case that everything was done properly and through the plaintiffs, we, who were there only through them were also doing everything we could properly.

On the other hand, and I am not indicating that this is how I feel you should find, but if you should find that the plaintiffs themselves were negligent in some manner, you will hear the charge by the judge. His Honor will charge you that if the plaintiffs themselves were negligent, there can be no recovery by them against Gulf and, of course, if that is the situation and if you so find, that will end the matter and Gulf would not be held liable and accordingly, there would be no case over against us, either.

In substance, it is either or. If you find they

rk-1f-354

were doing their job properly as I submit they were, then there should be no liability on our part to Gulf because we are there only through them and it is the bulk and overwhelming import of the testimony that they were there doing their job properly. If you should find there was negligence on their part which would prevent their recovery, then there is no liability as you will hear by the charge from the Court.

THE COURT: That piece of paper which counsel has in his hand, is a picture of the diagram that was on the board and it was admitted into evidence.

MR. DUBROWSKI: Your Honor, counsel, ladies and gentlemen. I represent Beamn.

You know we take a lot of notes here. In looking over the notes and figuring out what to say to you people concerning my client's case, I thought that I would tell you, if I told you everything that I thought was important to you, I would stand here talking all day. There are a lot of things I think are important but you heard the testimony and I won't cover them all, I will just cover some of them and tell you what I feel. Because I don't cover them it is not because I don't think they are important. If you do, do it, that is your job.

I will look at this thing through three things. First through the injuries, and I will do that because, frankly,

rk-1f-355

I don't think you will get that far. If you do, I want you to look at them the way I do, then I will discuss the issues among the various parties in the two lawsuits that you are to decide.

Concerning the plaintiff McLean, he was in the hospital two times, once for the operation, another time also in 1966 to have something done which he claims was as a result of this accident.

He left the hospital, he hasn't been back since. He was treated by various doctors. He was treated in the hospital. None of those doctors came to testify about his disability or what was wrong with him.

Mr. McLean testified that he went back to work a long time after this occurrence. Now, Dr. Burton, for what it is worth, for what he is worth, which I think is very little since he is the plaintiffs' own doctor, or the attorney's doctor, testified that he didn't treat these people, he just examined them for one purpose to come here and testify, that is all. He examined them six years after this accident.

He explained the operation procedure and everything and he said one thing, he said, "I like to keep them out of work at least a year," and he implied that these people went back before that and we know Mr. McLean went back to work later

rk-lf-356

than that.

If you get to the injuries, you have to decide how long Mr. McLean was disabled. That gives you a hard job if you get that far.

Mr. Linfante, again examined by Dr. Burton but treated by many other doctors, none of which were here. Again, we don't know how long he was disabled. Dr. Burton says looking back, the period he was out seems long enough but it seems Mr. Linfante was treated by doctors and his treatment stopped and he went back to work.

Where in between the disability ended, who knows, I don't see any testimony here.

Dr. Burton testified as to his disability. Neither one had special shoes or equipment. However, concerning Mr. Linfante I must say this. When the doctor examined him six years later, Mr. Linfante can do deep knee bends, stand on his toes, his heels and had no problem with the inside of his foot and to me, had no problem, but that is for you to decide and as I say, we have no people that treated him here.

How do we stand in this lawsuit? Plaintiff was bringing an action against Gulf saying that they were negligent in maintenance, management, operation and control of the premises. They say nothing about the work, or anything concerning that because plaintiffs are not suing Beaman who supplied

rk-lf-357

materials nor are they suing United who supplied the work.

They are suing Gulf and that there should have been an inspection.

In fact, we heard examinations before trial that consumed the entire day, Mr. Weiss, Mr. Wolf, Mr. Bashett and Mr. Casso. The net result of the whole thing was, the control of this building was under Gulf and nobody made an inspection. The only ones that could have made an inspection were the two plaintiffs, they were on the roof. They had been doing this work 75 times or 25 times for one, 75 to 100 for the other, and they were familiar with roofs and the whole operation and apparently they couldn't find anything wrong. Something was wrong with this thing, that caused them to have an accident. There were only the workers.

If it was the work that was done, they can't recover against Gulf because they are not suing Gulf for work and that is the one action. Gulf says the only thing that could possibly be done wrong is done in the work. I supplied materials and United did the work. That is their action against us, and I say if it wasn't the work, then we are not liable, because all we gave is materials and the only two workers there were the plaintiffs. That is basically what it all comes down to, really.

There is no notice of any defect here at all and

rk-1f-358

there is no notice that inspection would have given you notice because the plaintiffs were there and if they saw anything wrong and still did the work, that is their negligence and they shouldn't recover.

Q An accident happened here. The mere happening of an accident is not enough, the plaintiff has to prove it and I don't think he has.

Let's get the thing down as to basically how this accident happened.

We had some additional testimony here by Mr. Levine who was the expert who said it would be foolish for somebody to lean on this thing while doing it and to walk on it, never, you shouldn't do that.

Mr. Spencer didn't say anything about walking on it. In fact, I believe he did say walking, it is not built for walking.

We have three stories as to how this accident happened. We have Mr. McLean's story. Mr.McLean says, well, let's put it this way, he says two things. One thing he says in his examination before trial, he was kneeling halfway out on the overhang to put in the lights. He said nothing about a plate going in. He said we laid the top on the deck and the next thing was the lights went on. He said nothing about a plate. He said in the E.B.T. he was halfway

rk-1f-359

out. On his testimony on the stand, he moved it back. He changed the thing. He was on the top of the coping putting in the 60 to 70 pound light and according to his own testimony, this overhang was 30 inches long, two and a half feet. It is about like this, and I am standing here two and a half feet with this thing, putting it in, not touching anything in between.

To me that is impossible, nobody can do that. That is like taking the chair you are sitting on and holding it out two and a half feet and putting it into something. I wouldn't even try it. To me that is impossible.

Mr. Linfante, his story is different -- one other thing about Mr. McLean. Supposing there was something wrong with the coping and he is leaning out like that. Why is it more impossible for him? If something is wrong and he is leaning like that and it is on the coping and it gives, which way is it going to go, down or back on the roof? Plain physics. All of his weight is being pushed on that coping and if it went, it would go back on the roof, nowhere else, so that makes his story impossible.

Now we look at Mr. Linfante. He is out past the edge of the roof. He is out on the overhang. Where? We get to a big thing, whether he is a third or halfway out and he is putting pressure on, with hishand and putting in the

rk-1f-360

light. He is using that overhang as a lever. If you are on the coping that is one thing, but the further you lean out and put pressure, it is like a lever. The more pressure you have, the lever will force it to come down. It wasn't built for that. It was built as an overhang not to hold a light and if that is the way this accident happened, the plaintiffs can't recover because they caused it.

Now we have a third story, a man who is no longer with us, Joseph James, the owner of the station, and he testified what, he saw the little man laying on it and throw something back and the big man came up from the thing and walked on it to give it to the little man that was laying down and the whole thing came down.

If that is what happened, they can't recover, too, because remember, we broke for lunch one day and came back and the plaintiff asked one question of Mr. McLean, were you walking on it and his answer, no. Mr. Leavin said kneeling on it would be worse. Walking never. Their own expert, and Mr. James said he walked on it. He saw him walking on it. This wasn't built for walking and if that is what happened -- look, I can tell you why in a minute why he walked on it but if they caused it, you can't recover.

There is an old maxim in New York, never walk near a building under construction near quitting time because any-

671

rk-1f-361

thing could come down.

Remember Mr. McLean, we started 7:30 in the morning, we finished 3:30. This happened at 2:30 according to the policeman, Mr. McLean and Mr. Linfante, an hour before quitting time. According to Mr. McLean and Mr. Linfante, they put the deck on. The next thing that went on were the lights.

They forgot one thing, and that is when we went to that diagram on the board. They forgot the plate that holds the lights.

It is 2:30. They have put in the deck, the put in the plates, they took them from the roof, they had to put them in with ladders and they put two bolts in and they can't do this from the roof, this has to be done from underneath. The lights are still on the roof, it is 2:30, the end of the job, the last thing to go on. How are we going to get the lights on, we have to take them down from the roof, down the ladder and put the boards up and move them along.

That is going to go after 3:30, we will get it done in a hurry. They get up on the roof and they start doing it from the roof. They do it nicely, easily, but it is getting near to quitting time and let's get out of here and that is what they did and in their rush to get it done, Mr. McLean walked out to give something to Linfante and the whole thing

came down and that is what caused it and that is why I say I don't think you are going to get to injuries.

Based on those stories, even with their own expert, Mr. Spencer, too, this is not to be walked on. It is not even to be leaned on, but you can to a degree.

We have lots of notes here but basically we get down to one thing. What is Beaman doing here? Beaman supplied a blueprint first to Gulf, to United, the experts in the field. Gulf said in their opening, we are an expert, Beaman is. They do it for all the gas stations. Gulf is one of them. Gave them a blueprint, it was approved by Gulf, gave it to United. Everybody saw it. We guaranteed to contract for the work. If the plaintiffs recover, our work then was done right and they approved everything that we did; therefore, we are not in this lawsuit. However, the plaintiffs did something wrong outside the work, different from the work that was done in the normal course and that was, as I say, Mr. Jones testified --

THE COURT: James.

MR. DUBROWSKI: Joseph James. I have been calling him Jones.

Mr. James testified as to what they did and it is most probable that that is just what happened here.

Now you can see after Mr. James testified why the

rk-1f-363

plaintiff read all the examinations before trial except one. The one that was going to hurt him. The one that showed up as a witness, Mr. James, to tell you how this accident happened and that it happened only through the faults of the plaintiff.

I say that because even though I did no work here, it was done by others, that if it had been followed according to everything, nothing would have happened. As it was, nothing happened in the 75 to 100 jobs before, but something different happened here, a man walked where he shouldn't have and he caused this accident and, unfortunately, he was hurt, but a man should not be rewarded or compensated for his own faults. It is one of the things in life, I am sorry I have to ask you to do this, but I will have to ask you to find in favor of the defendants, to let the plaintiff know that next time he should be more careful.

Thank you.

MR. FUREY: Your Honor, counsel, ladies and gentlemen.

Since Mr. Ausubel clients have the burden of proof here, they have the opportunity to speak to you through their lawyer both first and last. We don't have any provision in our procedures here for any rebuttal. I suppose this is as it should be because an end must come sometime.

I ask you when Mr. Ausubel speaks to apply the test

rk-1f-364

of good common sense to his argument and his recollection of the evidence. I would also hope you apply that to us, but while he could comment on arguments I answer, I have no opportunity to comment on his and realize I don't concede anything he may say, but I want you to examine it.

We have engaged here for some week or more in a fact-finding expedition, and this is our system, a system growing more and more unique to our country in which, under which when facts are in dispute, we have juries. We have juries to sit and examine the facts and you as jurors are the last word and while you should listen carefully to all arguments and while you must take the law from the Court, no one else should invade your function in determining the facts, determining them as you see it, and to put it in another way, perhaps a little more high-flown, of finding truth, and the tools which are used to search for truth in our courts are essentially two. One is the oath, and the other is cross examination.

The oath is really a fabric, part of the fabric of our society. We have oaths involving our public officials, we have oaths involving the lawyers as officers of the court.

We have the oaths that you have sworn to do justice here, unswayed by sympathy, any extraneous considerations.

We have the oaths that the witnesses took, oaths to tell the truth, and your verdict in speaking out as jurors,

rk-1f-365

as jurors sworn to uphold the truth and justice, you must also pass judgment on whether or not some of the people who came here before you honored their oaths.

I will touch briefly on the cross complaints. I will not spend much time on it because I don't think my client Gulf is liable to these plaintiffs and, therefore, I think the complaints against Beaman and against United Porcelain should be academic. Should you ever get to that issue, I would simply point out as I said in the opening, Gulf in order to do this work engaged Beaman who they knew would be skilled in this particular type of operation. Beaman drew the plans, Beaman selected United Porcelain. United Porcelain supplied the men who were assumed to be expert in doing this job and Gulf relied on these two organizations.

You will also bear in mind, if you ever get to that point, you may have to consider not only whether McLean and Linfante were negligent, but also the question of supplying of ladders, scaffolding and instructions, but I don't think you will get to that point.

On the question of damages, I mentioned that again, not that I feel that the damages are germane to the major issues in this case, the issue on which it should be decided, which is negligence, contributory negligence, but because one

rk-lf-366

of the things you must decide is the question of credibility. Credibility is the same sort of judgment really that you make in evaluating people, in making business judgments, when certain things are presented to you by someone, can you rely on it, and if you are think you find one thing that you can't rely on, maybe you should be doubly cautious about accepting anything which is presented to you.

One of the reasons I mention damages, you have heard statements that competent producing cause of pain. That is a great phrase. Does it mean that the plaintiff was in pain? Yes, he said he was in pain. Fortunately we had some records available so we could find out whether he was or wasn't. We have the nurse's notes, we have the doctor's notes, and I read some of these to the plaintiff and I couldn't get a responsive answer as to whether or not he was in pain, whether or not he told the nurses about it and you heard some of the notes and, of course, this is in evidence and available to you in helping you to determine the credibility on which this case was presented.

You have a claim of very extensive lost earnings. Mr. McLean did let slip at one point that he gets laid off from time to time, so it was not presented to us how much he was laid off the year before, how much his annual earnings were as opposed to his hourly earnings. This we don't know

rk-lf-367

and, of course, the length of time that he was disabled with a fractured thigh, Dr. Burton said sure that is reasonable, but how did Dr. Burton come into the case? There are many doctors that treated these two gentlemen. One of them was the very surgeon that did the work on him. He is right here in the city. Why didn't we hear from him? Is it reasonable to assume that we didn't hear from him because his views of the injuries were conservative, more conservative than Dr. Burton or do you think his views were less conservative than Dr. Burton.

Dr. Burton had no reason to be here except for the fact he was brought in by the firm of Berman and Frost. I think you should consider these things in judging the credibility.

In determining the two major issues, whether or not the plaintiffs were guilty of any contributory negligence, whether or not Gulf was guilty of negligence, I suggest to you some questions I think that need answering based upon the evidence. The first question I suggest to you is, were McLean and Linfante on the overhang?

The second question is, was Gulf negligent with regard to the question of inspections?

The third question is did Gulf, assuming there was a defective or a hazardous condition there, did Gulf have

rk-lf-368

notice of it, did they know about it or should they have known about it, because if they didn't, how could they be negligent.

The fourth question, did this accident arise out of the work, out of the acts of Mr. McLean, Mr. Linfante themselves.

What is some of the evidence in this regard? Let's go back to the first question. Mr. McLean and Mr. Linfante, were they on the overhang? They sat there in that witness chair and swore that they weren't. When did they say that? We had sort of an interrupted order of proof here, and we had Mr. Leavin come in as an expert witness who was brought in by the plaintiffs. Mr. Leavin was asked on cross examination, and again, you could find so much of the truth on cross examination. "Mr. Leavin, if these gentlemen were out on the overhang, wouldn't that be foolish and reckless?"

"Answer: Well, I don't know about reckless, but it would certainly be foolish."

Where is the plaintiffs' case at this point, straight out the window, because they have to prove to you that they are free from contributory negligence, that they aren't foolish.

What happened then? Mr. McLean took the stand, Mr. Linfante took the stand. No, we weren't out on the overhang.

rk-lf-369

When we say overhang, we mean we were on top of the coping.

Well, can you believe that? What is the evidence? Back in 1970 before they sat in court and heard Mr. Leavin characterize their actions, these questions were asked of Mr. McLean and Mr. Linfante backed him up and said everything he said was true.

Let me read just a couple of them here:

"Q How far out on the overhang did you kneel?

"A I would say about halfway. We put our wood down, then we kneel there and we have the light in front of us. Then we lift it up and over onto the tracks.

"Q Were you still kneeling on the overhang position about a quarter of a foot out from the face of the building when something happened?

"A Yes."

Sworn testimony, given as Mr. McLean told you after a conference with his lawyer in his lawyer's office and subsequently typed up.

Of course, you heard the testimony that they put a piece of wood down to distribute the weight.

If they were on top of the coping, why in the world do they need wood to distribute the weight? Maybe because wherever they knelt the corrugation would be uncomfortable but that was in their own testimony. The wood was there

rk-1f-370

to distribute the weight. You don't need that, to distribute the weight, if you are on top of a brick wall.

Then, of course, the testimony as to the difference. 30 inches. They were on top of the coping. Do you reach out 30 inches to put the light in?

Of course, this overhead sloping down and the outside of the face, it would probably be just as foolish as reaching from the coping because there would be a good chance of tumbling right off, but in any event, their story that they did it that way didn't make any sense.

What was the word on that? Mr. James, he was there, he saw it. He saw they were on the overhang.

I don't think there is any question whatsoever in this case that Mr. McLean and Mr. Linfante were guilty of contributory negligence and in accordance with your sworn oath, your verdict must say so.

We have heard a lot of talk about inspection. Gulf was negligent because there was no inspection. What is reasonable under these circumstances? Gulf wants a job done, it is a rather specialized job. Under the supervision of the Building Department of the City of New York with regard to permits, they engage Beaman who specializes in this type of thing. They engage an architect. Beaman prepares plans. The plans are submitted to the City of New York. A

rk-1f-371

permit is granted. Beaman sublets the work, subcontracts the work. Gulf gets a copy of the plans, the testimony from Mr. Spencer.

Under these circumstances, should Gulf send somebody down from their office to climb up on the roof, or is it reasonable to assume between the architect, Beaman and United Porcelain, that whatever needs to be done will be done? Does that make sense, is that reasonable? Is that the way the average, reasonably prudent business man or home owner does things?

You don't go up on the roof to inspect. This is a hindsight effort linked to Gulf.

In any event, we do know, and this came in sort of by the back door, that there was a visit to the premises by a man from Beaman even though the examinations before trial didn't disclose it and Mr. Spencer told us, yes, somebody had to go down there and measure up the job. Would he inspect? No, he wouldn't inspect. Inspect is a square word. He would look at the building. Maybe there is a difference between the two, I don't know.

He did go there. Did the architect inspect? I don't know, I assume the architect did what he felt was necessary.

You do see what are detailed plans here. Interestingly

rk-lf-372

enough on the side of the roof, we see a measurement as to how high the parapet stood up. Did the architect prepare it by guesswork or did he do it by inspecting and is Gulf reasonable in assuming that he did?

Of course, we had a description of what constitutes a good inspection by Mr. Leavin. Mr. Leavin was engaged by Mr. Ausubel's office after the accident happened. He knew there was an accident. He had a general idea of what the particular problem was and Mr. Leavin went down to inspect and what did he do? Did he go up on the roof? No. He put a ladder up against the side of the building and climbed halfway up, and if you are going to have Mr. Ausubel second-guessing Gulf, I think you should consider this on reasonableness when he starts talking about inspections.

Then you had the inspection which was certainly done by Mr. McLean and Mr. Linfante when they worked over this area, when they worked their way down at one point putting up these vertical pieces up against the wall, when they worked through that area at another time putting the triangle braces in, when they put the decking in that curved over the very coping that they say Gulf should have known, that was defective and that Gulf should have known.

What did they see, nothing, absolutely nothing, and then they say that somebody should have come down from

rk-lf-373

Gulf's office, I don't know.

Of course, as to whether or not there was a defect, despite Mr. McLean's statement in his examination before trial and you heard it read, did you put any rivets into the coping, well, once in awhile we put a rivet in the coping, but I don't remember or I don't think we did any on this job.

Based on that, in my opening remarks, I told you the coping was not involved in any way to the fastening here, based on Mr. McLean's testimony which he had given previously.

What do we find from looking at these pictures? We find right here in the close-up, in this piece of coping, they apparently had driven two rivets in.

As far as using this coping is concerned, it was decorative, it was not weight-bearing according to Mr. Leavin. Maybe the rivets should not have been put in the coping. This was not Gulf's decision. This was up to the experts which include Mr. McLean and Mr. Linfante. It is 75, 25, 200 jobs. I forget the number. Certainly they should be familiar in dealing with buildings with coping, and if, in fact, they should not have been attaching this thing to the coping as one could well infer that Mr. McLean would not have admitted it on his examination before trial, it is all the more reason why they should have stayed off of that

rk-lf-374

overhang.

If the coping was loose, and I don't think we could tell at this point whether or not the coping was loose would result in the fall, or whether or not the brackets which are torn away from here, whether or not the overhang came down and dragged the coping because the metal is hooked over behind the coping, so if they were in a hurry, and if they were putting in those drive rivets as they apparently were doing some other things on the job and certainly equally reasonable is an explanation about how the accident was concerned, that these triangular brackets were not fastened properly and then the metal dragged the coping down. This we don't know. I submit to you, we don't have the burden of explaining which it was, Mr. Ausubel does.

If this coping was loose before the fall, how long was it loose, and how did it get that way, because this was a relatively new building.

Well, the question came up, how do you get these rivets into the wall. We use, I think he called it a drive drill. It is not a pneumatic type but it is electric, but instead of rotating the bit into the wall, it hammers it in and you may recall I was asking Mr. McLean (indicating) and he said no, it taps. It must be a great invention if you could take bricks and this coping which looks like stone here

rk-lf-375

but described as concrete, if you could take a machine which a man can hold in his hand with a drill bit and tap it into the stone. How long do you think you would be there, gentlemen, if you were just tapping, or is it, in fact, a machine that raps this rivet into the wall and if that is true, and if we find from this picture that these holes were driven into the stone, then how did the coping get loose?

What is reasonable?

Is there any proof here that Gulf had notice, knew or should have known of a defective condition? First of all, there is no proof that if that coping was defective, that the defect lasted for any longer time than these men were on the job themselves using their drill hammers, but assuming it was, is there any proof that Gulf knew or should have known about it?

What was the set-up there? The set-up was that Mr. James occupied the station and Gulf had agreed to be responsible for the structural repairs, but the set-up was according to Mr. James' testimony as it was read in, was that he would call Gulf if necessary before doing anything and he was there, he would be aware of any damage, any vandalism, anything that could possibly cause this condition up on the roof and he didn't know anything about it. He had no reason to believe there was anything wrong up there and he didn't call

rk-lf-376

Gulf. Gulf didn't get any word from James, they didn't get any word from the Beaman man who went down there and, in fact, if they had been so prudent as to hire a builder or architect as Mr. Ausubel did, they wouldn't have gotten any worry because Mr. Leavin couldn't see anything up on that ladder.

There may be some talk that notice to Gulf was driven home by these plans. Mr. Leavin was a builder and an architect and I asked him what these plans showed and we got a lot of confusing answers and he said the blueprint didn't show the coping and the gentleman from Beaman, yes, the coping did show on there and Mr. Spencer also said the plans don't show whether or not you are supposed to put anything into the coping.

Under these circumstances with one man who apparently thought fully qualified by the plaintiff to come in here and another man who is the head of a corporation who specializes in this type of construction, they don't see anything wrong with these plans.

Is it reasonable to assume that because Gulf got a copy of these things -- I don't know what they should have done when they got the plans, or was it proper for them as reasonable businessmen to rely on the architectural seal of Mitchell, which it says here, or the skill of Beaman Company

rk-lf-377

who Gulf knew was skilled in this business.

Did this accident arise out of the work? Was it the result of the job that was being done there by Mr. Linfante or was this accident caused by negligence on the part of Gulf? I think the question answers itself.

Let's comment a little bit on what Mr. Spencer said. He said there is a way to do these things, and you put them up from a scaffold or a ladder, preferably a scaffold. You don't do it by going out on the overhang, and, of course, not only is there a possiblity of the overhang collapsing, but you could fall off and I asked Mr. Leavin, if you have a work platform fifteen feet in the air, is that a scaffold and he said yes and I said are scaffolds required to have handrails around them and he said yes. Whether or not this thing was unsafe to go out on or not.

Mr. Spencer was an interested person, he was working for Beaman, and you have to determine whether he was guilding a lilly as to how strong this overhang would be, and, of course, he qualified it all by saying assuming it was properly installed and if it was properly installed, would we see it like this.

Mr. Spencer made a distinction between a live load and a dead load and he spoke of 30 pounds per square foot on a wide load, then he also spoke about distribution of

rk-1f-378

weight, et cetera, but Mr. McLean, according to Mr. Jones who was the causative agent of this, Mr. Jones testified --

THE COURT: James.

MR. FUREY: Mr. James testified he saw Mr. McLean out on the overhang and when he asked how and he said just like this, and he put his foot over the jury rail and he had a parapet that had to be stepped over or to be stepped on to get over this overhang and you have a 180 pound man that steps out on the overhang and lifts his other foot presumably.

How much live load per square foot do you have under this man's foot?

I think under these circumstances, all the evidence in this case, the evidence is quite clear that Gulf didn't cause this overhang to go down, it was caused to go down by Mr. Linfante, Mr. McLean and your verdict should be a verdict in search of truth should say so.

THE COURT: We will take a ten minute recess.

(Recess)

(After recess)

(In open court - jury present)

MR. AUSUBEL: May it please the Court, my adversaries, ladies, gentlemen.

I think this being my last opportunity to talk to you about this case, after having first met you almost two

rk-1f-379

weeks ago, that I am entitled to accept for myself the same privileges that my adversaries have accepted for themselves, and that is to make some remarks of personal reference.

I should tell you at the outset that I don't hold out that my memory is superior to your collective memories about the evidence in this case. Of necessity in the course of summation, lawyers must comment on the evidence and the reasonable inferences that can be drawn from the evidence, and if by chance in the course of this discussion that I have with you I misstate the facts, I have an incorrect assumption of what the evidence is or what is reasonable to be drawn inferentially from the evidence, I hope you accept my assurance that this is not intentional on my part, that I in no way wish to mislead you. There is a record of what was taken by way of testimony. Perhaps more significantly in a case such as this, there is a record of exhibits and the exhibits include photographs which were taken shortly after the accident.

The exhibit, and perhaps this is the key exhibit in the whole case, the Gulf-Beaman plan which is in evidence which portrays as early as March, 1966, almost four months before this accident, how this plan at the insistence of Gulf was contrived and what work was entailed, and how this overhang was contrived in such a manner that the overhang was

rk-1f-380

to go clear across the coping of this building, the coping not to be altered by the contractors who were retained by Gulf, and how this coping was never intended nor designed to support any structure of that type, so I say to you, that a case of this kind does not turn upon dispute as you invariably have them in testimony. It turns upon scientific evidence. It turns upon photographic evidence. It turns upon documentary evidence, and I might say to you that I subscribe to one of the things that Mr. Furey brought out with you, and that is, that the two tools that lawyers use to test out the truth in a given case are, one, the oath, and second, cross examination.

You will recall the last bit of evidence in this case was Mr. Furey's cross examination of the Beaman representative, a graduate engineer, Mr. Spencer, and this is what Mr. Spencer said in cross examination elicited by Mr. Furey, the two tests for truth with respect to this matter of the overhang.

"Sir, if they actually went out on top of the overhang itself, would there be a safety problem?

"A No, sir.

"Q Sir, when you spoke of a 30 pound live load, if a man is standing upright and weighs 180 pounds, how much of a live load per square foot would there be?

rk-1f-381

"A It depends on the area. Between the two brackets, certainly not a, a man standing on the end, one bracket itself would hold two people standing on the end of it."

These are the two guidelines he suggested and which I subscribe to for truth. This man Mr. Spencer was a man who had an interest inconsistent. I suggest, inconsistent with those of those two workers. This man is a man trained in the science of engineering. It was his employer who manufactured two thousand of these overhangs. It was his employer who had a regular arrangement with Gulf, and he told you under oath in cross examination by Gulf that this overhang, if that plan were proper, if this place were safe for these two workmen to work on, that this overhang would have withstood the weight of these two men, not leaning but standing, standing on this overhang, accepting any version you wish of this accident and I am not here pointing a finger as to perjury, that one witness lied or another didn't lie. Invariably you will have conflicts about what happened in a fraction of a second.

Mr. James says he saw three bricks come down. He said he was standing near pumps. He told you in his deposition about how they were half on and half off the overhang, then he told you what he said in court. I am not saying he is perjurious. This was his impression and I am saying to you it

rk-1f-382

is an ill grace to suggest that these two men came here to bear false witness and when you look at these photographs, you will see how this plan which Gulf contrived and which they knew about from at least as early as March --

MR. FUREY: Objected. There is no evidence that Gulf contrived the plan.

THE COURT: That is correct.

MR. AUSUBEL: Let me say this. These plans according to Beaman's representative which was submitted to the Building Department in March bore the imprimatur, the signature of Gulf's architect Mr. Mitchell, and Mr. Spencer indicated that a set of these plans was sent to Gulf as they were to United Porcelain, after these plans were drawn, and I say to you that that constituted notice to Gulf of what kind of work was entailed, and that this work called for two workmen skilled in their trade, not skilled as engineers or architects, following these plans which were then developed and it called for them to do the work as they were doing it, and the place was unsafe for that contemplated work.

So, I say to you as I said before, that this case does not turn upon conflicts in testimony. It does indeed turn about this indisputable offered photographic and scientific evidence.

One or two other things. You have heard, and quite

rk-1f-383

properly so by one or more of my adversaries that lawyers have a tendency to get imbued with their cases and identify with their clients. They have a tendency to perhaps raise their voices. You heard twin voices in openings casting and pointing a finger at these two men, telling you that it was these two men and not the coping that was the precipitating cause of this accident.

They told you again that it was the way they did their work and not the condition of the plan or the coping which caused this accident, and I am sure they did not intend when they raised their voices any disrespect to you and if I raised my voice, I hope you accept the fact that I am not intending any disrespect towards you, either.

On the one hand, you have heard throughout the thread of both the opening arguments and the summations, on the one hand you heard from Gulf's representatives, from Beaman's representative that these two men were skilled and experienced people. As a matter of fact, and there is no dispute about it, it came out through the testimony of Mr. Casso after he checked his records, that Mr. McLean had done some 75 of these jobs before this, and Mr. Linfante has done some 25 of these jobs before this, and there is no proof in this case that whatever they did on these other occasions, 75 and 25 in number, were any different on those occasions

rk-1f-384

than they did here.

Bear in mind these are sheet metal workers. They take the tools of their craft as it is given to them. They take the premises as they find it. Their job is not to seek out structural defects. Their job is not to seek out imperfections in plans.

As a matter of fact, again on these two guidelines of the search for the truth that Mr. Furey called your attention to the truth and cross examination, when he questioned Mr. Spencer on February 14, 1974, virtually the last testimony in this case, "When the measurements were made by the representative of either Beaman or United Porcelain, sir, would the person who made the measurements ordinarily know the problems that might interfere with the work?"

"THE COURT: How does he know if he doesn't know who made the measurements?

"Q Is that the practice in the trade?

"A No, we would not pick up structural flaws."

Bear this in mind. When a representative was sent down by Beaman or when they requested someone else to go down to make an inspection for the purpose of making measurements, they had a benefit which these two laboring men did not have. They knew what plan was devised for this work. They knew then, and I am sure you will take this in with you, they knew

rk-lf-385

then that this overhang had to go clear across the parapet, clear across the uppermost portion of this structure, the coping. They knew or should have known, those who were responsible for engineering in Gulf or architect in Gulf, they knew then that the coping was not a portion of a structure which was designed to support weight. Notwithstanding that, they tell you under oath, Mr. Spencer said under oath in cross examination by my adversary, the attorney for Gulf, that they could not discern or discover structural defects, yet you heard twin voices here, Mr. Dubrowski, Mr. Furey on behalf of their respective clients tell you that these two workmen who were unsupervised on this job, whose function it was to follow instructions, to use the ladders to put up the materials on top of the roof so it doesn't interfere with the station, that they should have been the ones to go out and discover and discern and make an inspection for structural defects or imperfect plans, and I say to you that it defies common sense and it defies reason and it defies experience to impose upon these people, the nondelegable responsiblity that Gulf had for originating this project and for Beaman, who went ahead and performed it jointly in connection with the plans that the architect drew up.

For a time while I listened to these summations, I thought for a time I was on trial or my firm was on trial. We

rk-1f-386

brought in an expert as if we manufactured the witness, and this is an expert, who by coincidence has been used, not infrequently by Mr. Furey as an expert, but only when he happens to come to court on behalf of the plaintiff, does he get the kind of treatment that he got in summation.

Then you heard about Dr. Burton, as if he came to court to bear false witness, and they talked about silent witnesses. They talked about doctors who were treating these people and I tell you now as you heard from Dr. Burton, these two men got the best of treatment considering the nature and gravity of their injuries. It was Dr. Burton who had the benefit of examining them and taking X-rays of them in 1972, 1973, and if they in the slightest questioned the integrity of that proof, the opportunity was afforded to them under rules to have their own examinations, to seek out their own interpretations of the records and I will have occasion to analyze the integrity of this defense on both liability and injury.

In any event, they point a finger at us for not calling this or that doctor and I ask you where was Mr. Mitchell, Gulf's architect, where was he to tell you how it was that he permitted his name on these plans, how it was that he permitted this plan to be filed with the Building Department so that this overhang went clear across a non-

rk-1f-387

structural member of the coping and went down on the other side, how it was that Gulf permitted this project, how it was that Gulf permitted for this project without the slightest evidence, not the slightest evidence that anybody ever went up on this roof, either before these plans were drawn or after the plans were drawn and before this accident, and I tell you that the slightest degree of care or prudence on the part of Gulf had they, their engineering departments, their real estate departments even taken the trouble to look at these plans that were devised by the architect that they selected, they would have known that this was a trap for these two men, that they were destined to fall on this and this job alone, because that coping was never intended to sustain this kind of job, and the way they did it, I might say, was the way it was done for the benefit of Gulf. It was done so that these materials could be taken out of the way so that that service station could continue to operate during the time that they were working, so that gas, oil and other Gulf products would be sold for an economic advantage to Gulf and it was put up on the roof, and this is the way it was done each and everytime by these men. There isn't the slightest evidence to the contrary and again, Mr. Spencer, an officer of Beaman Corporation, a graduate engineer, a man submitted by Beaman Corporation as being familiar with its work

rk-1f-388

product, being familiar with this particular job and the arrangement that it had with Gulf, he recognized that this kind of work would be done from the roof. This testimony was read into this record. You decide cases not on suspicion or guesswork, but on evidence, on your good common sense based upon this evidence and what did he say about this roof?

"Q Woud one in order to put this on the building proper or could one work from the building to put on the overhang?

"A Some of it could be done from the building.

"Q From the roof of the building?

"A Part of it could have been done from the roof of the building."

What part of this work would have been done from the roof of the building if it wasn't the way they had done it in every other instance, and now they are going to tell you with the benefit of hindsight, they would like us to have scaffolding. They would like us to bring on scaffolding. I don't know who they are talking about, whether they are talking about United Porcelain or whether they are talking about two workmen.

These men are required to work with the equipment, with the tools that are furnished to them. It is not their responsibility to seek out other methods and means to work

rk-lf-389

and if this was as much of a concern of Beaman and Gulf before this accident as it is now after the accident and after the damage has been done, then I say to you that they owed it to these workmen to have advised them of this alternative, what they now claim is a safer means of operation.

MR. FUREY: Objected to. There is no such obligation as a matter of law.

MR. AUSUBEL: I say it is arguable.

THE COURT: He could argue that.

MR. AUSUBEL: I say it comes in ill grace after the event to suggest that, particularly when they made no suggestion about this before the accident and wasn't it because of the interference with the work proper on the station that motivated this work to be done in the first instance on the roof proper.

So I ask you to judge these men as they are, don't judge them on quotations out of context in a deposition. I could read to you testimony of Mr. McLean where he described what he meant, about where he was leaning and it doesn't make the slightest bit of difference where he was leaning or standing, take it any way you want. Take this search for the truth, this cross examination of Mr. Spencer who came here with interests hostile to those of the plaintiffs that told you that that overhang if these plans were properly contrived,

rk-lf-390

if that building was secure for that purpose, that two men could stand on the overhang and it wouldn't come down.

Now they would like you to get these experienced skilled workers on the one hand and to tell you that they didn't do their work properly. Maybe they used a hammer or a drill, and it turns out it is a rotary thing that puts this rivet into it. Following their plans, doing it this way for three days or four days before the accident, well if you take a look at these pictures which are in evidence, you will see how badly they put in these brackets. They are still there even after the collapse, and what are they saying to you, where is the evidence here, that a stretch of fifteen or seventeen feet of triangular bars comes down simultaneously, concurrently as they are doing their work, each and everyone of those brackets not being put in properly.

These are men who do things as a matter of second nature. These are working men. These are not men who are skilled in words. One man I think had eight years of schooling, another man I think came to this country about six years before the accident, and it is difficult for them to express in words. They are not lawyers. It is difficult for them to articulate what it is that they do day in and day out as a matter of routine. That is the way they are trained. The life of the law and the life of anybody's life is not

rk-lf-391

based upon logic, it is based upon the day in and day out experience, and these are two experienced men who follow the same course of behavior day in and day out.

Are you going to say now based upon suspicion or lawyers' talk that they did not put in securely that triangular bar? Is that what caused this collapse? Where is the proof?

Your Honor, the first exhibit in this case, the first exhibit in this case was an official report of the Emergency Service Division of the New York City Police Department, and you heard that officer, a man who had been on the force for some 20 years. He didn't know at that time by the way any more than we knew what Mr. James told you about that structure, to use his language and not embroider upon it, "It was run-down." He had complained about it to the Bronx manager of Gulf, threatened to walk off the lease, told you that never once did a human being go on top of that roof to make any inspection before these two people were sent down to work on that job, and you heard this police officer who came down within a half hour after the accident, absolutely no interest in this controversy, who together with other policeofficers went ahead and investigated and interviewed various persons including the plaintiffs at a time when Mr. McLean or Mr. Linfante did not have a lawyer by the name of Ausubel, at a time when they didn't have any lawyer, without

rk-lf-392

any opportunity to rationalize or reflect or to come up with some excuse which would exculpate them and inculpate them, an instant reaction, and others with instantaneous reactions, and made out an official report and you didn't see the contents of it, but you will when you take it into the jury room, and if you look at that report, you will see as to what was the cause of the collapse as it was recorded on the very tour of duty that that officer with seventeen years of experience had put down as the composite of the official, disinterested police investigation which then became a public record, and you will see that they ascribe then, that very day, not McLean and Linfante after they saw Ausubel, right then and there, that this accident was occasioned by the collapse of the coping and do you think it was any other way?

What explanation do they have for seventeen feet of coping coming down if it wasn't for the improper plan that was submitted which they knew or should have known about and a structure which they never inspected before two workmen who make their daily bread from what they were doing were sent onto this job site.

I could go into many other things. I will only say one or two things with respect to what my adversaries have developed with you in these twin voices of Beaman and

rk-1f-393

Gulf and that is about burden of proof. Let me suggest to you that this is not a criminal case. I am not a district attorney nor a public prosecutor. The burden of proof is not upon me to prove a case beyond a reasonable doubt. This is a civil action. It is a civil action that is brought under law in which two men say that they were harmed and injured and damaged by reason of the negligence of Gulf Oil Corporation, and the burden of proof is upon them through me to prove a case by a fair representation of the believable proof, and if I had the opportunity which I will never have of being invited into your homes, perhaps to discuss this with you in terms of life's experience and common sense, I suggest to you that it means that the case that is put in against Gulf is better than the case that is put --

MR. FUREY: I will object to this. This is clearly an invasion of the Court's charge.

THE COURT: I will tell them.

MR. FUREY: May we have an instruction to the jury that they will disregard Mr. Ausubel's view of the law?

THE COURT: He is just arguing. Don't pay any attention to what his idea of the law is, I will tell you what the law is and the burden of proof is part of what the law is.

MR. AUSUBEL: So it is that I suggest to you that

rk-lf-394

these men come in here as a right. I suggest to you that this defendant did not provide and discharge its responsibilities of providing them with a reasonably safe place to work, and if that place was safe, if this plan were safe, if that coping were not used to support this structure which should have reasonably been compensated, that destiny would not have brought us here together, and that these men are entitled to recover damages under law.

In discussing damages with you, your attention was directed in both the opening statement as well as in the summation to the matter of sympathy and I probably could refer to expressions through the ages that have been memorialized for us through other tongues about sympathy. Perhaps even many many years ago, perhaps not as long ago as one of my adversaries referring to when he referred to certain portions or a narrative from certain portions of the Bible.

Let me tell you now without going into that element, we do not come here for your sympathy. I am sure that these people after their accident between their families and friends, were loaded with sympathy. We come here for the only remedy that civilized people can give to others who have been wronged, and that is for money damages. Damages fall into two categories. They fall first into the arithmetic damage, the out-of-pocket losses which are scientifically

rk-lf-395

calculable, more or less exact, and they also fall into the inexact, the social science, what we refer to as pain and suffering.

First as to the nature and quality of the evidence. It wasn't Dr. Burton alone who came here to testify concerning their conditions, and I might say came here to testify as a man with great experience in the field of orthopedic surgery, which happened to have involved the kind of injury and damage that both of these plaintiffs sustained.

You remember as part of his qualifications, that amongst other qualifications, this man is on the staff of the leading hospitals in New York and is also a professorial rank at one of our leading medical schools, and I say to you that you would be proud, you would be proud indeed if you had a son or daughter who decided to study medicine if he or she could train at his feet and he was not only buttressed by what he observed, all of which is being assailed for lawyers' talk, not evidence, but also through hospital records, and do you remember the assault that Mr. McLean took at the insistence of Gulf in cross examination as to this man's believability, this liar, this malingerer, this exaggerator, about the pain and the disability and the discomfort after an operation of the kind as is described in this record which was performed upon him within two days after

rk-1f-396

this accident?

Does this deny reason when a man has an operation for a comminuted, and you heard that, the bone, the thigh was smashed into several fragments from a spiral type injury falling from a roof? And they put in a seventeen inch rod in the course of this operation with three screws, using tools, perhaps not even of doctors, but of carpenters, coming out after ether from a general anesthesia and to suggest to you, and ask you to defy common experience that this kind of an injury was not as productive of pain and suffering because he clipped out on this particular day or that particular day at that particular hour that he didn't have pain.

I say to you, that that approach which is really the whole approach of Gulf and goes to the integrity of its entire defense, it defies the concept that every human being must know, whether he is at eight grades of learning or several degrees, that pain is a universal language and that suffering is a universal experience, and it transcends all educational and language barriers.

What happened to these men? Let's take Mr. McLean. You heard about the nature of the bone that was shattered in this case. It was the right femur, and it was comminuted. What is that kind of an injury without regard to anything else?

rk-1f-397

This is a weight-bearing structure on a man who earns his living by using his legs and his hands, and who can't function, can't function economically. He is not a lawyer, he is not a professor, he is a sheet metal worker, and he can't function economically, and what are they telling you, that he stayed out fourteen months just to look at the fictitious garden he is supposed to have at his house?

Don't you think a man of this kind concerned for his wife and children to support them, that his interest was, as indeed he did do, return to work as soon as he possibly can?

MR. FUREY: I will object to this claim since there was a specific objection to anything going into it on the trial and at this point I move to reopen my case to show this question of financial need while he was out.

THE COURT: He is arguing that he wanted to go to work.

MR. AUSUBEL: He told you he was out of work for fourteen months and he told you that he worked regularly before this accident and his employer testified and it was read to you, and perhaps boring, and I apologize to you for it, but nevertheless through the adversary system that we have, Mr. Cosso was examined and he was asked what was his rate of pay and did he work regularly and was his work

rk-1f-398

satisfactory and it is in the record, and now they are trying to suggest to you maybe this and maybe that, suspicion him out of court, when your oath is to decide the case on evidence and not on suspicion.

That was that injury, the initial injury and he was in the hospital for eighteen days and I might say eighteen months.

Now if nothing else was in the case, what is that worth?

You have heard and quite properly, by the attorney for United Porcelain, that a jury represents more than six people, it represents the collective conscience of the community, so when you decide a case of this kind, you, yourselves, in essence, are placing values upon the conscience of the community. What does the conscience of the community evaluate an injury of this type? What is that period of hospitalization worth? Do I have to direct your attention to what experiences one has living through hospitalization? These are not country clubs. These are institutions of misery. Do you know what it means to be in a hospital for eighteen days and nights? Do you know what it means to have to prepare yourself twice for a major operation and what goes through a man's mind and what anguish he suffers? Do I have to draw pictures for you, you who represent the conscience

rk-1f-399

of the community? Who bore upon your collective experiences in life and after he left the hospital, after he plucked out these various dates from the first hospitalization when a nurse's record had he was feeling okay at that particular hour, you heard and you saw what happened. That he developed pains secondary to the injury from immobility, pain in that right leg and he developed a clot, what the doctors refer to as thrombophlebitis and he was taken back to the hospital on July 27th, twelve days after his first discharge and they were then concerned about the problems of the clot breaking off. It is in the hospital record, and going to his lungs.

THE COURT: We are not concerned with what didn't happen.

MR. AUSUBEL: In any event, you heard what Dr. Burton said, that this is a constant chronic problem and it will be constant and chronic notwithstanding all of the suggestions about potential surgery and putting in plastic ducts and everything else, and he will have to live with that problem as he will have to live with that rod, that seventeen inch rod and those screws which are in his right femur and he will have to live with them for the rest of his life, and to date, he is out of pocket for his wage loss and hospital and medical bills over $15,500, and that is the nothing part of the case, because that doesn't take into account the pain

rk-1f-400 710

and the anguish and the suffering that he experienced for the last seven years plus and the pain and the suffering such as he may have it for the balance of his normal life expectancy of over fourteen years.

You will be asked, and I hope that you will address yourself to those concepts. To place values on things such as enjoyment of life, and good health. Things that we accept normally and which we are only forced to put a dollars and cents sign on on occasions such as this.

That was Mr. McLean.

Then there is Mr. Linfante and his arithmetic loss, out of work for over eight months with this comminuted fracture of the left oscalcis, the heel bone, and you heard the significance of that in the anatomy. Sure he went back to work. Sure he is wearing shoes, but you heard what Dr. Burton said as to its significance in terms of his ability to work and work on the kind of terrains and structures he works with. This is not a pool table he is working on. He is working on rough surfaces and what it means to him and what it will mean to him in the future and you will see in the hospital records, in addition to that, he had compression fractures of two of his vertebral bones and various lacerations which had to be sutured, and he, too, experienced pain, two operations, through two hospitalizations. Seventeen days in

rk-1f-401 711

number. Seven years plus for him and in his case because of his comparative youth, over 32 years ahead of him.

If it weren't for this accident, if it weren't for that plan, if it weren't for that unsafe place that they were directed to work, to work in the manner in which they were trained to work and work on every other occasion without mishap, we wouldn't be here.

The remaining two causes of action do not involve personal injuries, but they do involve significant rights. They involve rights that are now reciprocal in this state, and that is to say, that a wife has a right to bring an action to recover damages as a result of injuries to her husband.

There was some evidence here about some small amounts for which they were out of pocket because they stopped working. There is other evidence which obviously remains silent, but again, you, too, as the conscience of the community, must give expression to those values and they are important values.

I am sure there are many things that I have left out. My clients and I have come to you to seek justice, full justice. There sat in this very building a learned jurist who has since departed and by coincidence, his name was Learned Hand, and it was he who urged upon all of us that thou shalt not

rk-1f-402

ration justice, and I urge that commandment upon you.

This eighth grade graduate is entitled to full justice under law. This gentleman who came here in 1960 is entitled to full justice under law. Their spouses are entitled to full justice, not part justice, because part justice is as much an injustice as none at all.

This accident happened a long time ago. Over seven years ago. And I for one have borne an awesome burden during this time. I have now completed my job and I now discharge my responsibility. I transfer the mantle of this responsibility to you and you do them justice.

THE COURT: I see it is 1:15. Why don't we return at 2:30.

AFTERNOON SESSION

2:30 p.m.

CHARGE OF THE COURT

(Knapp, J.)

THE COURT: Ladies and gentlemen, as you are aware, I am in an unaccustomed courtroom so I don't know how my voice carries and if any of you don't hear, please indicate one way or the other and if counsel for any party either can't hear me or doesn't think the jury can hear me, I would take it as a favor if you would let me know.

Just in general what happens, I am going to lay down the charge as I think the law to be then I am going to excuse you for a few minutes while counsel for the respective parties can make suggestions or objections or any other suggestions or criticisms they may have of the charge, then after I have heard that, I will call you back and make an modifications or anything I think is appropriate and submit the case to you.

It is quite obvious why I do it that way because no lawyer wants to get up and say Judge, that was awful what you said and I say no, it isn't, and he will just emphasize what he thinks is wrong.

The first thing really I want to get firmly in your minds is that you are the exclusive judges of the

714

rkbr 2

facts and anything I may say about the facts, anything counsel may say about the facts, has nothing to do with it, and I may comment on the facts as I go along to illustrate a point.

The fact I refer to certain testimony or don't refer to certain testimony has no bearing whatever. As I say, I listen to the testimony for an entirely different reason than you listen to it. I listen to it to hear what has been said because what has been said determines how I should react. It determines what charge I should give you or what ruling I should make on the evidence.

What I know of the testimony is wholly irrelevant. I may think it is the silliest statement in the world that was said but that is all I need for my job.

On the other hand, you may think it is an extremely wise statement and, therefore, what I think means nothing to you.

Another kind of axiomatic thing is the principle that all persons are before you as equals. As plaintiffs' counsel says, you shouldn't ration justice. Of course you shouldn't ration justice any more where the plaintiffs are concerned or Gulf Oil is concerned or any other corporation or individual is concerned. Everyone comes before the bar

of this court as an equal. Your job is not to find out what the facts are, not who ought to benefit or not benefit. Your job is to find out as best you can what the facts are.

As part of that, you are the exclusive judges of the credibility of the witnesses and there is not much mystery about how you judge the credibility of the witness. Every day in our lives we have to judge the credibility of things that are said to us. Our children say things to us, our parents say things to us, people with whom we do business say things to us, our bosses say things to us and as we go on through life we begin getting certain antennae, certain feelings that we may or may not be able to express as to why we think people are telling us the truth or why we don't think they are telling us the truth and by truth, I mean the facts as they happen, which frequently have nothing to do with whether a witness thinks he is telling the truth.

This accident happened in 1966 and here we are in 1974. One thing you could pretty well count on as to what you heard from any witness isn't exactly what happened. Common sense and experience tells you, that anybody looking back over an event, especially six years ago, sees it through all different kinds of prisms and

rkbr 4 716

it is your job to figure out exactly what happened as best you can.

The theory of the jury system is, the law thinks, and I think properly so, that this process of finding out what happened is more likely to be done correctly if six, as in this situation, individuals apply their diverse life experiences to the problem.

If I had to decide what witnesses were telling the truth, and again telling the truth in the sense that I am using the word, in the sense of what actually happened, if I decide that, I only have one set of life's experience to go by, my own, and my luck at it would necessarily be warped in some measure by my own experiences.

You have six such life styles and life experiences to go by and the theory of the law, the truth is more likely to emerge if a composite if you apply compositely your six different life styles to the problem; but, of course, that will only work if you do what the law presupposes you will do and that is to discuss it among yourselves and give each of your fellow jurors the benefit of your experience and you accept with an open mind their experiences, and in that way, the truth ultimately emerges.

There are certain guidelines that go along with this. You notice I say guidelines. They are not rules.

RKP 5

They are merely for your guidance.

One concerns interested witnesses. The law says you should take into account the interest a witness has in the outcome in deciding what the truth is. Again, I come back to the fact that the truth is not what the witness thinks is the truth; it may be quite different from what the witness at a given moment thinks is the truth, but his interest in the outcome may color his own idea of what the truth is.

That, of course, we meet in our lives every day. Everybody who talks to us usually has some interest in our taking one side or another or taking some position with respect to what he says, he or she.

Usually, people that don't have any interest in what they are going to say keep quiet. They don't say anything. The mere fact that they are talking means they have an interest in having you believe the truth, and in everyday life having you believe what they believe to be the truth, and in everyday life you develop certain antennas how to weigh that and how to take into account the person's interest in deciding what actually happened.

Of course, the plaintiffs in this case are obviously interested. They stand to get money, they hope, out of your verdict. All of the other witnesses have one interest or another. You have heard argument about some of the

RKP 6 718

interests of the witnesses, and you can appraise yourselves what the given interest of a witness is.

Then there is a rule about expert witnesses. Normally, a witness can only testify to what he or she has seen or observed or experienced in some way. An expert witness, however, by hypothesis hasn't necessarily seen anything. In this case we have had several expert witnesses. Two purely expert witnesses who by hypothesis hadn't seen anything first-hand. The doctor and the expert that the plaintiff called -- I forget his name -- Mr. Leavin, who testified. Then, Mr. Spencer knew some things of his own knowledge and also testified as an expert as to certain things that these structures would or would not do, and youheard argument on that from both sides.

The jury is entitled to give an expert witness such credence as in its judgment it thinks the expert deserves. What you go on is, how accurate were his observations. He usually tells you what his observations are based on.

Do you believe the basis of his testimony? In other words, if an expert gets on and says, "I heard such and such testimony, and on the basis of this I come to such and such an opinion," if you don't believe the testimony, his conclusion doesn't mean anything to you, and do his conclusions mean anything to you on the basis of what you know?

RKP 7

There have been conflicts, on one particular thing I can think of: this blueprint. My recollection is that one of the experts said it showed you are supposed to put the rivets into the coping and the other expert said it didn't. If there is a conflict between experts, you get the picture drawing yourself, see what the drawing says to you and think back to the two experts, how they impressed you and how they aided you.

Experts are to aid you in the use of your own eyes.

There is a question of the burden of proof. In this case, the plaintiff has a burden -- I told you there are two lawsuits -- three, actually, going on here. One is between the plaintiffs and Gulf. The plaintiffs have the burden of proof on every issue as between them and Gulf. The burden of proof means simply this: it means that the plaintiffs, or the party bearing the burden -- in some cases it is the defendant, but here it is the plaintiff throughout -- the party bearing the burden of proof has the burden of persuading you, that is, in this case, their version of the facts is more probable than not.

If the party having the burden of proof persuades you that his or their version of the facts is more probable than not, then that party has borne that burden.

RKP 8

720

If, on the other hand, you come to the conclusion that plaintiff's version of the accident, of whatever issue you are considering, is less probable than not, then obviously it hasn't borne the burden, but the other side has borne a burden which it doesn't have in this case, or if your mind is in equipoise, you can't possibly make up your mind what happened on any issue, then the plaintiff hasn't borne the burden, and you are not supposed to flip a coin.

Unless you are satisfied that the party having the burden has established that their version is more probable than not, then that party hasn't borne the burden.

There are three issues here, and I will come to the discussion of those issues. One was the accident caused by Gulf's negligence? That is, as between the plaintiffs and Gulf. And, two, were the plaintiffs free of contributory negligence? Which I will describe to you later; and, three, what was the extent of the damages?

On all these issues, the plaintiff has the burden of proof. By a like token, Gulf, if you should find a verdict in favor of the plaintiffs against Gulf, then Gulf has the burden of proof on its actions against the other two defendants.

Incidentally, I have frequently told you that I have no views that amount to anything or as to what your verdict

RKP 9

721

should be in any case, and, obviously, as I have discussed the evidence, I will say first they have to prove this, and, assuming they prove this, we discuss that, and assuming we discuss that,then we have to go to this.

The fact that I go on after the first paragraph doesn't mean I think they have proved it. Obviously, I can't send you back into the jury room every five minutes, saying, "First consider this problem; then come back and tell me what you do; then consider that problem and come back," so as I go along I assume for the sake of the discussion that you found the first part in favor of the plaintiff or whatever part I am talking on; then I go on to discuss the possibility that you made such a finding. The fact I am disclaiming it doesn't mean that you should, either.

We have three lawsuits. The first lawsuit is, have the plaintiffs made out a case against Gulf, and, if so, has Gulf made out a case either against Beaman or United Porcelain?

The first thin I guess you should do is figure out just what happened, and then, after figuring out what happened, then I will discuss with you on the hypothesis of what you decide, what the legal consequences are.

As I understand the plaintiffs' contention, it is that the accident happened because the plans which were pre-

RKP 10

722

pared -- and we will come to who prepared them and how, later -- the plans called for using the coping to bear weight of the overhang and that the plaintiffs were following the instructions in those plans and that those plans were defective in that the coping, which somebody, one of the witnesses, describes for us as an architectural ornament, should not have been used to bear weightand that that is the cause of the accident.

Gulf, on the other hand, contends, as I understand their argument, that the plaintiffs have not established how the accident happened and that it could have been due to a variety of causes. It could have been due to the negligence, the negligent manner in which the plaintiffs attached the braces and supports to the wall,and you heard the discussion of that in the summations, and it could have been due to the plaintiffs' improper placement of theirweight on the overhang as they were working.

If Gulf is right in their primary position, namely, that the plaintiffs haven't satisfied you, the probabilities are, more probable than not, the accident happened the way the plaintiffs submitted to you ithappened and that it could have been by some undisclosed way, that no one has stopped to figure out, then the plaintiffs haven't borne the burden, and we need go no further.

RKP 11

Considering the case on the assumption that the plaintiffs have satisfied you that it is more probable than not that the accident happened as I understand their argument correctly, as I just described it, then, accepting that as a fact, and I assuming you will have accepted it, but, again, I caution you, the fact I assume you have doesn't mean you should or shouldn't, and then you next have to decide whether as between the plaintiff and Gulf, who should bear the responsibility for that accident.

Before we get to that, let's clear up the nature of Gulf's responsibility. Gulf is not an employer of these plaintiffs, so get out of your mind any preconceptions you may have about the responsibility of an employer to his employee. As most of us are aware, in a great many situations, an employer's relationship to an employee is that it shares in various types of liability where no fault is incolved, and all you have to do is show that an accident happened for legal responsibility to come into being. That is not the situation here, and cast out of your mind any predispositions you may have under that theory.

Here, plaintiffs were not employees of Gulf, and they can only recover against Gulf if Gulf was negligent, negligent in the performance of some duty owed to them.

So, the plaintiffs here were on Gulf's premises as

RKP 12

724

business invitees. I don't know if that means anything to you, but it is a word we lawyers like. It means if you invite someone on your premises for business of your own, you have certain obligations of due care to them.

Assuming that the accident happened as plaintiff contends, what should in your judgment -- and your judgment is going to count -- is Gulf responsible for not having called it to the plaintiffs' attention? But first let's decide as between the plaintiffs and everybody else in the case.

It is the defendants' contention that it was plaintiffs' fault and nobody else's fault that the accident happened. You heard the argument on that, and it seems to be conceded, as far as I know, that if the screws were used, if weight was attached to the coping, that was the wrong thing to do, and that was the cause of the accident.

If in fact it is your judgment that the plaintiffs should have seen that, should have seen that this was coping that they were dealing with and should have known that putting weight-bearing rivets, plugs, rivets into that coping was a foolish thing todo, a negligent thing to do, then they are guilt of what is called contributory negligence, and that is the end of the case. They are not entitled to recover as against anyone else, because in a negligence case, the law says that you have to establish that you are free from

RKP 13

725

contributory negligence.

You have heard the arguments on that. The defendants argue that the coping was as obvious to them as anyone else, and they should have known that putting weight bearing on the coping was a foolish thing to do and a negligent thing to do.

The plaintiffs, on the other hand, argue that they are not educated men, they are not engineers, and they were entitled to take the plans that were made and assume that their elders, shall we say, knew what they were doing and plaintiffs didn't exercise independent thought in the matter.

That is a question for you to answer: have the plaintiffs satisfied you that it is more probable than not that they were free from contributory negligence in the context of what I have told you?

Then, if you have concluded that they are free of contributory negligence and still on the assumption that they have satisfied you as to how the accident happened, and, therefore, that someone should have told them about this coping, your next question has to be, should Gulf be that someone, because Gulf is not responsible for the negligence as such of its contractor, if you left out a contract for somebody to do some work and that contractor, independent contractor, and you having no supervision over him, does it

RKP 14

in a negligent way, that doesn't put responsibility on you. That is his responsibility. But you have to find in this case, if you want to find, that the case against Gulf is warranted, that something in the facts made it Gulf's obligation to call the attention of the plaintiffs to their danger, and you heard the evidence on that; you heard the contrasting views as to what these blueprints showed, and you heard that Gulf, from one of the witnesses, Spencer, I recollect, testified that when these blueprints were prepared, one copy was sent to Gulf.

The question before you is, do these blueprints indicate what was to be done, and, in the second place, was the totality of the circumstances such that it put upon Gulf anaffirmative obligation upon Gulf to notify somebody so as to prevent this work being doing in what you will have concluded was a negligent fashion.

If your answer to that question is in the negative, or, to put it another way, if the plaintiffs have not borne their burden, that is the end of the case.

As all parties made clear in their summation, all parties are in here derivatively, and if Gulf is not liable to the plaintiffs, that is the end of the case.

The question you have to decide is the totality of all the circumstances: was Gulf under some obligation to take

RKP 15

steps to prevent this work being done in a way which you come to the point that made the previous findings favorable to the plaintiff in the way which you have decided was a negligent way to proceed.

So much for the case as between Gulf and the plaintiffs, or the plaintiffs and Gulf.

Now, as between Gulf and Beaman, Gulf's claim over against Beaman is based on a contract. This contract -- you heard about the contract; you heard about how Beaman was under contract to do these things, and this contract, referring to Gulf as the purchaser, they refer to it as the purchase of an overhang.

This contract provides that Beaman shall indemnify and save harmless the purchaser, that is, Gulf, from all loss or damage in any and all claims by reason of accidents, injuries, including death or damage to any person or property in connection with such work.

Normally, the meaning of a contract is a matter of law for the Court and does not trouble the jury. However, if the Court finds that the contract is ambiguous, that creates a questionof fact and is submitted to the jury.

I have found for present purposes there is an ambiguity here, and here are the contentions of the parties:

The contention of Gulf is that this is an absolute

RKP 16

guarantee, an absolute acceptance of liability and indemnification for any damages that come from putting this overhang on the building pursuant to the contract, and that is what Gulf says in meant by

Beaman says that in connection with such work, Beaman complied with the specific work provided in the blueprint, which, as you remember, Beaman's man said they sent to Gulf.

If so, Beaman says that if you find that the work was performed exactly like the blueprint says, even though that was the wrong way of doing it, if you find that it was done exactly like the blueprint says, then, says Beaman, "We are not liable on the cross-claim."

That is the question I am leaving to you, assuming you find Gulf to have been negligent, are they indemnified by Beaman, and that means how you read this contract. does it mean they have to slavishly follow this particular diagram, and if they do that correctly, they are off the hook as far as Gulf is concerned.

This has nothing to do with the cause of action as between Gulf and the individuals. If that is what this contract means, Gulf is not entitled to a cross-claim, and if not, it is.

On United Porcelain, the question is a little

RKP 17

different. Their only contractual obligation was to do the job in a workmanlike manner. So their contention is simply this: We were hired; our contract called upon us to do nothing more than to provide competent workmen. That is all we were supposed to do. We did provide competent workmen,and that was the end of it as far as we are concerned.

Gulf, on the other hand, says that common sense demands that you see to it that your competent workmen have a job to do that is safe to do, and, therefore, you should have provided independent investigation whether this particular job is safe and that we are able to rely on you and that we are able to rely on you to see that whatever job we sent to you was a safe job to carry out, assuming you have found the basic cause of the accident as claimed by the defendant.

That is for you to determine, which of those positions is most reasonable and likely on the basis of all the testimony that you have heard, and there has been a cubit's worth on that issue, and the question is, was United Porcelain to assume, as they are contend they are entitled to, that plans that they received from Beaman and Gulf, if they got them from Gulf, were all right in themselves and all they need do is send workmen, or should they have made an independent check to see that everything was all right,and as you answer that question you will decide the case as between Gulf

RKP 18

730

and United Porcelain.

I have talked about liability. Just a word about damages.

Obviously, if the plaintiffs have not satisfied you as to their burden of proof as I have described it that Gulf is liable, then we don't need to concern ourselves with damages, but if they do satisfy you, then we should.

The damages are of several kinds. First, there is medical expense. That has been stipulated to, I think, and you will get a figure on that.

The second is loss of earnings. Loss of earnings simply means that if as a result of an accident your earning power is reduced, you are entitled to be compensated for it.

These people were out of work for specified periods of time that you heard. That doesn't ipso facto get compensated for, that time off. Their obligation is to return to work as soon as they are able to do so, and you have heard the arguments on that, and it is for you to decide whether or not they did respectively, and, of course, on damages everything is entirely separate as to each plaintiff, each plaintiff's case is entirely separate.

As to each plaintiff, did he return to work as soon as he should have, in all due regard to his medical situation? If you find he did, he is entitled to whatever

PKP 19

wages he lost during that period, and if he didn't he is entitled to wages up to and including the time he should have returned to work.

My recollection is, once they returned to work they got the same pay as they had before, and that there had been no diminution in earnings as a result of this accident, at the time they returned to work.

You are entitled to consider the possibility of future diminution of earnings if you find there is such a possibility. You are not supposed to speculate; you are supposed to find, if you do so find, that with all the evidence that is reasonable, in the future, that they won't be able to work because of this accident, and you are able to take that into consideration.

I don't recollect any evidence indicating that. That is not to mean that you have to remember everything that I remember.

Then they are entitled to recompense for pain and suffering, and as to that there aren't any guide lines except your common sense. In the first place, figure out as best you can how much pain they suffered, and that includes any kind of pain, inconvenience, discomfort, and how much they are likely to suffer in the future, and you heard that, and, remember, this pain and suffering isn't just an

RKP 20

instrument to punish the defendant or to reward the plaintiff but it is the best you can do as to what you reasonably think they should be paid on account of this pain and suffering.

As I say, it is not to punish the defendants or to reward the plaintiffs, but you use your best judgment as to what you think youought to give them for that, and obviously nobody receives pain for a fee, so there is no market in pain. There has to be your judgment.

It is the same thing in the wife's action in each case for loss of consortium. That includes everything that goes with a marital relationship. It has been interrupted by this accident. To whatever extent you think it has been. And there has been some minor out-of-pocket expenses which these wives, or one of them, had -- one of them, as I recollect, lost some time at work, and you will remember what that evidence was.

There again, the law says the husband, either the husband or the wife is entitled to compensation for the interruption of the marital relationship,and obviously there is no market in that. You are to use your good judgment, and the same criteria apply. You are not to punish or reward -- just what you think is right.

I think that covers everything I have thought of

RKP 21

at the moment, and I will ask you to retire, and don't begin to discuss it or express any opinion, because it is quite possible there is something I have overlooked or something that one counsel or the other might persuade me to change, so don't begin any deliberations,and I will send for you in a few minutes.

When you come back, will the alternate bring with him any personal effects out of the jury room.

(The jury left the courtroom.)

THE COURT: First, the plaintiff.

MR. AUSUBEL: Your Honor, I indicated when I moved for a mistrial at the beginning of the case my position with respect to any reference about the employer-employee relationship, but in any event I respectfully except to that portion of the charge where your Honor indicated that as between the employer and employee there may have been some rights which were predicated upon liability without fault.

Otherwise, I have no exceptions to your Honor's charge, and I do not request any further charges at this point.

THE COURT: Gulf?

MR. FUREY: Your Honor, I respectfully except to that portionof the charge which submits to the jury the question of whether or not the plans which were drawn were

734

RKP 22

defective and dangerous, inasmuch as that is not the plaintiffs' claim, according to the pre-trial order, calling the Court's attention to Paragraph 3(b) of the pre-trial order. No mention is made whatsoever of it.

THE COURT: You waived that when you didn't object to his summation or object to what I said before summations.

MR. FUREY: I respectfully except, your Honor.

THE COURT: I will say thatno one seems to have prepared this case to any point.

MR. FUREY: On the issue of contributory negligence, I except to the charge as being incomplete in this regard, that the issue of contributory negligence as submitted to the jury was based solely upon the possibility that the jury found that the plaintiffs were negligent in using the coping for weight bearing.

I respectfully submit, your Honor, under the evidence in this case, the jury might also find that the plaintiffs were negligent in going out upon the coping, which their own expert said was a foolish act.

THE COURT: If that didn't contribute, then it wouldn't be contributory negligence.

MR. FUREY: I agree with that, but it is for the jury to determine.

THE COURT: That is correct.

RKP 23

MR. FUREY: Your Honor, with regard to the submission of the contract between Gulf and Beaman to the jury, I except, your Honor, on the basis that I take the position that there is no ambiguity in the contract and that Gulf was entitled to a judgment as against Beaman as a matter of law on the contract.

THE COURT: I know that is your position, and it is noted.

MR. FUREY: I further request, your Honor, if the issue is being submitted to the jury as between Gulf and Beaman, that the issue of common law indemnity also be submitted, inasmuch as under the present tenor of the case, that where Gulf's liability, if any, is not to be based upon the plans, that these very plans were prepared by Beaman, so even absent any contractual agreement between Gulf and Beaman, the cause of action over under common law indemnity ought to be submitted to the jury in that regard.

THE COURT: What does Beaman say to that?

MR. DUBROWSKI: It says that the plans were not prepared by Beaman; they were prepared by Gulf's architect.

THE COURT: It seems to me that the jury can find that they were prepared by Beaman.

MR. DUBROWSKI: They could also find that they were prepared by Gulf.

RKP 24

It was Gulf's architect who prepared pages 1 and 2 of that three-page thing, and the only thing Beaman had on it was what it had for the measurement.

MR. FUREY: With regard to the submission of the issue to the jury as between Gulf and United, your Honor, as I recall it, perhaps I didn't get it all, your Honor, but the only specifications submitted in that regard were the claim that United claimed that they provide the proper workmen,and that is all they have to do.

I would request that the jury be instructed that the negligence of any United employee is attributed to United Porcelain.

THE COURT: That is academic here, because if they find the workmen negligent, there is no case.

MR. FUREY: Specifically, I would request that the jury be advised that they may find that United Porcelain was negligent to the extent to justify a claim over for failure to provide scaffolding,adequate ladders,and failure to provide proper instructions to the workmen.

THE COURT: That is correct, but they can't possibly find over on the negligence of any workman, because there would be no case.

MR. FUREY: That is all the exceptions I have.

MR. DUBROWSKI: I will go down the list I have.

Some are requests,and the others are exceptions.

I think the first one is a request that was not covered by the Court,and that is, if they find that a witness testified falsely as to a material fact, they can disregard all the witness' testimony or only disregard --

THE COURT: Who testified falsely to a material fact?

MR. DUBROWSKI: Mr. McLean testified as to one fact, whether or not he was on the coping or went out altogether. Mr. Linfante testified he was out a little bit. Mr. James testified he was all the way out --

THE COURT: I will give that charge if you want, but I will elaborate to some extent which I think plaintiffs would be entitled to, that the mere fact it must be a deliberate falsehood today and not a mere recollection which has been changed by a passage of time, which is what I think happened, and when I get through I am sure it will be obvious to the jury. If you want me to do it, I will do it, but I can't do it unless I make sure that the jury understands that merely changing recollection over the passage of time does not trigger this rule,and in making that clear I think I will inadvertently make clear to the jury that is what happened in this case, because I think that is what happened.

RKP 26

Do you want me to leave it alone or do you want me to do it?

MR. DUBROWSKI: Leave it alone.

As far as burden of proof, I think you should charge that if they find that that plaintiff's burden on a material fact is equal to that of the defendant Gulf --

THE COURT: The plaintiff's burden?

MR. DUBROWSKI: If the plaintiffs' proof is equal to that of that which could be for Gulf, then the plaintiff has failed to sustain the burden.

THE COURT: I think I said that.

MR. AUSUBEL: Yes.

MR. DUBROWSKI: I am sorry. Your Honor, I also join in the exception that the plaintiffs contend that the sole thing in this action is that the plans show the coping was used to bear weight. I think they have other contentions in this thing besides that.

THE COURT: They did in the beginning, but their summation boiled down to that. Isn't that correct?

MR. AUSUBEL: Yes.

MR. DUBROWSKI: Their opening was a little different.

THE COURT: That was a long time ago. I again say, if this case had been prepared the whole case would have

RKP 27

never got to here. Neither side prepared the case.

MR. DUBROWSKI: I take exception to your Honor's failure toinform the jury that Beaman has a cross claim against United on common law active negligence.

THE COURT: You are certainly entitled to that. I forgot.

MR. HAUT: It is the same as Gulf's claim.

MR. DUBROWSKI: And that Beaman is not responsible for the subcontractor's negligence if there is no supervision, control or management by Beaman over United employees.

THE COURT: The same applies as between Beaman and Gulf.

MR. DUBROWSKI: Also, your Honor, this is a request if they find that the cause of the accident was a coping, the coping, the faulty coping or a structural flaw, then this is outside the indemnification of the contract and not covered by the contract.

THE COURT: I don't see that that is any different from what I said; I covered that on the facts of this case as well as I can.

MR. DUBROWSKI: Lastly, your Honor, if they found that the plaintiffs found this to be an unsafe place to work and continued to work there, then they have assumed the risk.

THE COURT: I think that is legal language, but I

RKP 28

think what I said covers it.

MR. HAUT: Your Honor, it will be my last opportunity to renew my motion again. I suggest there is no credible evidence either as it was before or in light of Mr. Furey's comments, that there is no credible evidence to support any further instruction in this case with respect to Gulf and United Porcelain, that in fact, the only question was duty to inspect, and as far as the other elements, scaffolding, going out on the overhang, is a matter of credible evidence, and there was no issue presented on that point at all, and it completely exonerates United Porcelain, and I would so move.

THE COURT: Your motion is noted.

MR. HAUT: If your Honor is going to charge that further request with respect to the further duties of United Porcelain, may I suggest your Honor also put this in perspective by referring to the testimony of Mr. Spencer that your Honor said you would mention to the jury, the right to remain or work on the overhang as being able to support the weight.

THE COURT: I intended to refer to that, but I didn't think it would be proper to do so after the way plaintiff had spent so much time on it in his summation.

MR. HAUT: If you take that into consideration, I

RKP 29

741

would ask you to bring it to the jury's attention again, because in effect this would isolate or bring out some aspects of the totality of the evidence, to wit, scaffolding or the propriety of going out over the overhang, which should be taken into consideration with Mr. Spencer's testimony that this was a solid structure upon which men could walk safely.

I have certain requests to charge.

THE COURT: I have covered them.

MR. HAUT: There are certain items you haven't, and I respectfully request -- may I just mention the numbers, your Honor?

THE COURT: Don't mention numbers.

MR. HAUT: I would specifically refer to the last two.

THE COURT: I just realized I haven't covered them. I have forgotten that entirely.

MR. HAUT: May I refer to your Honor Number 6, also Number 7?

THE COURT: That is beautiful language, but I think it is covered.

MR. HAUT: I think it should be made clear to the jury whatever duty we owed to Gulf must have been a proximate cause of the occurrence in order for United Porcelain to be liable.

RKP 30

742

Number 8 is an item Imention to your Honor before.

THE COURT: That follows.

MR. HAUT: I would suggest Number 10 and Number 11, and this again goes to the duty to inspect of United Porcelain.

If plaintiffs had no duty to examine, then the case will never get to you.

MR. DUBROWSKI: When six of the jurors return on a verdict, they are to report it.

THE COURT: It has to be unanimous.

MR. FUREY: Your Honor, I spoke only to my exceptions before. I haven't spoken to my requests.

I typed these up myself over the week end, and I didn't keep a copy. May I look at the Court's copy?

MR. DUBROWSKI: While he isthinking, your Honor, I notice here Number 4, Number 3 on the printed thing that was just given me, how you evaluate the damage claims of plaintiffs Ethel McLean and Susan Linfante in Number 4. I think I called this to your attention before, that after this action was started and after Gulf brought in Beaman and United Porcelain, the plaintiff amended his complaint to include causes of action on behalf of Ethel McLean and Susan Linfante, and Gulf did not amend its third-party action as against Beaman.

Therefore, as it presently stands, the only action

743

PKP 31

is against Gulf and against Beaman --

THE COURT: The jury doesn't have to worry about that. The jury answers these questions, and we can take this into account.

MR. FUREY: To the extent it is necessary, I move to amend the third-party complaint, which includes the causes of action included by the plaintiff.

THE COURT: It is kind of late to amend complaints. Denied.

MR. HAUT: May I mention one other item? In Item 4 I think this is crucial to this case and --

THE COURT: That is nonsense.

MR. HAUT: It happens to be the law of New York.

THE COURT: It is nonsense in this case.

MR. HAUT: It happens to be the law of New York.

THE COURT: It has nothing to do with this case.

MR. HAUT: It does.

THE COURT: On the plaintiffs' theory, it has no more to do with this case than the rule in Shelly's case.

MR. FUREY: Your Honor, with regard to requests, in view of the comment made in summation by plaintiffs' counsel that Gulf should have supplied scaffolding, I request a charge that Gulf had no obligation to provide scaffolding to these plaintiffs.

RKP 32

MR. AUSUBEL: What I said was that it came in ill grace for anyone to suggest that the plaintiffs should have gone out and gotten scaffolds. That is what I said in response to that argument.

THE COURT: Yes. Denied.

MR. FUREY: With regard to the request to charge which was previously submitted, I request Charge Number 3, that Gulf was not responsible for the negligence of United Porcelain.

THE COURT: I said that. You weren't responsible for negligence of contractors.

MR. FUREY: Request to Charge Number 6, the plaintiffs claim that the accident occurred when they were on the coping. Unless you find that the plaintiffs have proved by a fair preponderance of the credible evidence that the accident happened substantially as claimed by them, then your verdict must be in favor of Gulf.

THE COURT: I told them that, but they have changed their claim that was written, and they said their claim was based on the evidence, and if you had a contention that it was precluded by the pre-trial order, you should have said so earlier.

MR. FUREY: Your Honor, I didn't object to the plans going in. I thought they were germane to the issue that the plaintiffs were litigating.

RKP 33

THE COURT: When I told you what I thought the issues were, if you thought the pre-trial order precluded plaintiff from taking that position, you should have said so.

MR. FUREY: I did not understand, your Honor, that it was incumbent upon me.

THE COURT: The plaintiff understood. I could tell from his summation.

MR. FUREY: Request Number 6: Gulf had no specific duty under the law to make an inspection of the premises but did have an obligation to exercise reasonable care, which may or may not have included the duty to inspect.

THE COURT: I don't think there is any issue of inspection in the case as the case has finally come down to. There was no evidence that the coping was defective. It was just coping, and it shouldn't have been used for weight bearing.

MR. FUREY: In that case, your Honor, since there was so much talk about it during the trial --

THE COURT: I understand. This was not prepared -- this case was not prepared by Gulf, who was very derelict coming into this case not knowing why the accident happened and not finding out until the very last question of the last witness.

MR. FUREY: I still don't know.

RKP 34

THE COURT: I do. It is perfectly clear on the basis of the answer of the last question to the witness. It happened because it was used -- the coping was used as a weight bearing thing, as the pictures make clear, as everything makes clear, and the testimony that went on at pretrial for months and months as to where they were standing isn't relevant.

MR. FUREY: I agree, but so much of this trial --

THE COURT: I can't stop you from wasting time.

MR. FUREY: The plaintiff was the one that brought the case in here.

THE COURT: The plaintiff brought the case in here, and you didn't take the trouble, or your client didn't take the trouble to send an engineer to find out what caused the accident. I have to present to the jury the case as it finally is developed by the evidence.

In this case, the last question was, what did it?

MR. FUREY: In view of your Honor's statement that there was nothing wrong with the coping, can the jury be advised of that, so that it is then out of the case?

THE COURT: There was no evidence that there was anything wrong with it, one way or the other.

MR. FUREY: I respectfully except.

I respectfully request, your Honor, a charge with

RKP 35

747

respect to the claim over by Gulf against United Porcelain. Section 240 of the Labor Law required United Porcelain to provide safe and adequate scaffolding for the use of its employees. If you find there was a failure in this regard and such failure was the proximate cause of the accident, then you will find United Porcelain to be negligent.

THE COURT: Denied.

MR. FUREY: Request Number 13, with regard to the claim over by Gulf against Beaman. If you find that Beaman undertook to inspect the premises prior to the commencement of the work --

THE COURT: There is no evidence that they either undertook to inspect it or --

MR. FUREY: There was evidence that someone went --

THE COURT: And you saw a coping. There is not a scintilla of evidence that anything was wrong with the coping, except it was not intended to bear weight.

MR. FUREY: Nothing further.

MR. HAUT: I just wondered if these questions that your Honor has prepared -- might it not be better to work it down with respect to the plaintiff Gulf's liability and plaintiffs' contributory negligence rather than as Number 1? I am just suggesting that.

THE COURT: No.

RKP 36

Any other objections to the proposed questions?

When I saw them I saw I had neglected your last two requests.

MR. FUREY: Your Honor, one further exception. In regard to Question Number 6 on the questionnaire to be submitted to the jury, I submit, your Honor, that the apportionment is proper on the common law theory, but as to the contractual theories that Gulf is entitled to be indemnified, they should be indemnified by a hundred per cent.

THE COURT: I agree with you, but if they find a verdict -- I will have to modify 4 and ask whether it is on the contract or common law. Then I will leave 6 stand, and how we work out the results of the jury --

MR. DUBROWSKI: Your Honor, about the questions, I think we should have a 4-A: If you find a verdict in favor of Beaman against United --

MR. HAUT: That is covered by Number 6, which is the apportionment. There is no requirement of any special cross claim, and, in effect, what the Court is doing in 6 is saying, who owes what here?

THE COURT: You have a cross claim against United?

MR. DUBROWSKI: Yes, sir; I do.

THE COURT: On what basis?

MR. DUBROWSKI: Common law act of negligence.

RKF 37

THE COURT: Doesn't that come under 6?

MR. DUBROWSKI: It could, but then it may be the full recovery as against United.

THE COURT: As a practical matter, can it be? If they find, if they were going to give you a full recovery, they would find United Porcelain a hundred per cent responsible, so you don't need it.

MR. DUBROWSKI: It is true that way, but then again it would be before them, the cross claim would be before them.

THE COURT: The verdict doesn't have to be any different.

MR. DUBROWSKI: No.

THE COURT: Could it be both contract and common law?

MR. HAUT: No; it is only common law.

THE COURT: Gulf against Beaman, could it be both contract and common law? It makes a difference whether it is on contract or common law. Could it be both?

MR. FUREY: Yes, they could find both of those.

MR. DUBROWSKI: Either one or both.

On second thought, it can't possibly be both. On common law, he is coming against me, saying he did nothing and I did the work wrong.

THE COURT: At common law you should have notified

RKP 38

United Porcelain of the fact that they have to do something different because of the --

MR. DUBROWSKI: I disagree with your Honor, but I will note my exception.

THE COURT: Let's see what I agreed to.

There is no change as between Gulf and the plaintiff; is that correct? Have I agreed to any changes as between Gulf and the plaintiff?

MR. FUREY: Yes. I understood you would charge that contributory negligence may also be decided on the basis of the plaintiffs' going on to the overhang.

MR. AUSUBEL: Your Honor indicated in that regard if you are going to go back over that, that it has to be the proximate cause, and you would advert to the testimony of Mr. Spencer.

MR. FUREY: If your Honor is going to start adverting to the testimony of Mr. Spencer at this point, we should also refer to the testimony of Mr. Leavin, who said it would be foolish to go out on the overhang.

THE COURT: I will advert to both.

As between Gulf and Beaman and Gulf and United, Gulf's claim is that either Beaman or United should have provided scaffolding and ladders.

MR. FUREY: And proper instructions to the workmen

PKP 39

on the part of United.

MR. DUBROWSKI: Not Beaman. Beaman had nothing to do with scaffolds. We didn't do any work. We only supplied the materials. We don't have any duty to give any scaffolds to the plaintiffs or anybody else that United works for. That is their thing. This is why I asked, since we have no supervision and control or management over the employees, we are not liable for any negligence of the subcontractors or employees. The only one who has any duty, if there is any duty, to supply scaffolds or ladders or other equipment, is United.

THE COURT: Why isn't that correct? I said it wasn't.

MR. FUREY: I think I agree with Mr. Dubrowski. It should be submitted to the jury as against United as to whether or not they should have provided scaffolds, ladders or instructions.

THE COURT: Then what is your common law action against Bezman?

MR. FUREY: Under the turn that the case has now taken, where we are being held liable for the plans, the plans were prepared by Beaman, and if they were defective --

THE COURT: If the jury finds they were prepared -- I don't remember who prepared the first architectural draw-

RKP 40

752

ing.

MR. FUREY: It has Beaman's name on it. I am not too certain of this, but I think that the testimony of Mr. Spencer was that it was prepared by Beaman and a copy was sent to Gulf and a copy was sent to United.

MR. DUBROWSKI: It was prepared by Mitchell, the architect.

THE COURT: Who was responsible for that architect was not clear, as I recall it.

All right. That is between Gulf and Beaman, who was responsible for the plans. As between Gulf and United and Beaman and United --

MR. HAUT: Your Honor, requests to charge 9 and 11 were to the effect that the Gulf Corporation may only act through its employees, and they were the only employees on its premises.

THE COURT: You keep on saying that and you forget that the contention is that they should have told these employees to produce ladders and stuff.

MR. HAUT: They can't ask for them?

THE COURT: You should have told them. That is their contention. Obviously they can ask for them. What happened on the premises is only through those employees; how they got there is your responsibility and what tools they

RKP 41

got there is your responsibility.

Ask them to come in.

MR. DUBROWSKI: I think the one thing you haven't really covered again is that if the jury finds that the defect was structural, then it is not within the confines of the indemnification between Beaman and Gulf. I think you agreed to that.

THE COURT: I told them what it was, and it is perfectly clear that there was nothing wrong with the structure except that it was misused. That is the theory, and Beaman, arguably, should have had more sense to draw a plan for that, and Gulf maybe should have stopped them when they saw the plan. That is the whole issue in this case.

(Jury present.)

THE COURT: In the case as between Gulf, as between the plaintiffs and Gulf, the only addition to the charge, I just want to remind you, which I didn't refer to, to Gulf's contention that one of the contributorily negligent acts that these plaintiffs, according to Gulf, were guilty of, was going out on the overhang, and you remember all the testimony back and forth as to where they were and when they were there and why they were, and Gulf claims that that is a contributorily negligent act, getting out there, which contributed to the accident.

754

RKP 42

In that connection, Gulf refers to the testimony of Mr. Leavin on cross-examination, who, I recollect, said it would have been a foolish thing for them to go out on the overhang.

Plaintiffs' lawyer, on the other hand, refers to the testimony of Mr. Spencer, who testified to the effect that if properly constructed, two men could stand at the end of the overhang and nothing would happen.

Bearing all that in mind, let me come back to plaintiffs' burden on contributory negligence. Plaintiffs' burden on contributory negligence is to show that no negligence, to your satisfaction, as I have described it, to show that no negligence of theirs contributed to the accident, so in the first place, were they negligent in going out on the overhang, and, in the second place, did it contribute to the accident?

The plaintiff contends they weren't negligent -- or the plaintiffs do -- and, in any event, it didn't contribute to the accident because of Mr. Spencer's testimony; and Gulf, on the other hand, contends both that they were out there and that it did contribute to the accident and calls attention to Mr. Leavin's testimony.

That is for you to decide. The mere fact that they are careless doesn't put them out unless it contributes to

RKP 43 755

the accident, but it is up to them to prove either they were not careless or it had contributed to the accident.

As between Gulf and Beaman, Gulf called my attention to the fact that I neglected to point out in their cross claim -- they had two cross claims: one was on the contract as I described to you, and the other is the same type of a cross claim they have against United, namely, that they undertook to do the work in a workmanlike manner, and, says Gulf, if this plan was improper and it was the plan that causes the disaster, then Beaman was responsible to them for preparing that plan.

On that, there is a lot of conflicting testimony as far as I can remember, as to exactly how this plan came into being. If Gulf was responsible for proposing the plan, this phase of the plan is all that counts, the phase of the plan which caused the weight-bearing rivets to be driven into the coping, if that phase of the plan was prepared by Gulf, and then, of course, Gulf has no complaint against Beaman, but if it was prepared by Beaman, then you could find the claim over against Beaman on its warranty of doing a workmanlike job.

That is what we call a common law claim against Beaman.

Then, on the claim over against United -- and

Beaman also has a claim over against United, but it doesn't really make any difference the way you are going to answer these questions; Beaman has a claim over against United on the theory that they say that United should have produced, not these two individuals but their bosses should have provided them with ladders and scaffolding to do this work instead of permitting them to do it from the roof.

You heard all the argument about that, everybody argued about that, both sides, whether there ought to be ladders, why there shouldn't be ladders, why there should be ladders, and if you find that Beaman's management should have provided ladders and scaffolding, then you may find that is a reason for a claim over by both Gulf and Beaman against United.

Your foreman has the questions that you are going to answer, and I will just read them to you.

First, do you find a verdict for plaintiffs against Gulf. If so, in what amount as to each? Then there is a dollar sign and a line foryou to fill it in.

Remember, each plaintiff stands on his own feet, and this is really two actions, two lawsuits tried together. I don't know of any rational basis as to which you could find liability for one plaintiff and not the other.

Assuming liability, then the amount of damages as

RKP 45

toeach plaintiff is entirely independent of the other, and you evaluate the damages.

How do you evaluate the damage claim of plaintiffs Ethel McLean and Susan Linfante? That again is a wholly individual matter, and, of course, the fact I am going over this doesn't mean I have any indication how you should do the previous ones.

Then, do you find a verdict in Gulf's favor against Beaman in contract, that is the first theory I gave you before you retired, and also at common law, and you could say yes to either or neither of those two questions.

Do you find a verdict in Gulf's favor against United Porcelain, and that is only in common law, and that is what I discussed before you left and after you came back, and you could answer yes or no.

Then there is a new wrinkle in the law that I just forgot to tell you about. If you find a claim over as against either Beaman or United Porcelain -- if you find Beaman to be negligent or United Porcelain to be negligent, then you can apportion the damages. You can give a verdict saying how you think the damages should be divided up between them. This is wholly immaterial to the plaintiffs how you do this. You can do this, apportion the damages between them, and in making such apportionment of responsibility, you just take into

758

account the relative degrees of fault of the defendants and of Gulf Oil Company.

Assuming you found for the plaintiff, assuming you have found these people have some negligence, then you can decide among yourselves which of the two was more negligent and therefore how they should bear the burden between themselves.

Anything further?

MR. FUREY: I believe in the absence of the jury we discussed the question of the instructions that were given.

MR. HAUT: I think your Honor covered that.

THE COURT: I think I have covered it.

Will the alternate please stay behind?

Your verdict must be unanimous. On the other side of the street you can give five/sixths. On this side of the street you can't.

Will you swear the marshals?

(The deputy marshals were duly sworn.)

THE COURT: You may leave.

(At 4:00 p.m., the jury retired, in the custody of the deputy marshals, to begin deliberating upon a verdict.)

THE COURT: Mr. Alternate, you came close. You got

RKP 47

759

in there once. You are excused with the thanks of the Court.

(The alternate juror was excused.)

MR. HAUT: May I except to the portion of your Honor's charge relating to the liability between Gulf and United Porcelain and specifically with respect to the furnishing of scaffolding or the safety devices on the ground, as there is nothing in the evidence, no credible evidence whatsoever to justify any verdict on that ground.

THE COURT: That was the same thing you said before.

MR. HAUT: Yes.

THE COURT: You don't want me to do anything different. You didn't want me to do it at all.

MR. HAUT: Yes.

MR. DUBROWSKI: Your Honor, I believe you had a slip of the lip in that last portion. You were talking about United providing ladders, and in the last sentence it went like this: "If you find Beaman failed to provide ladders, then you can find in a cross claim as against United, Beaman against United."

I think you meant United, but you later cleared it up.

THE COURT: As long as the end result cleared it up.

Off the record --

RKP 48

760

(Discussion off the record.)

THE COURT: It is agreeable that the exhibits may be furnished to them upon request?

MR. AUSUBEL: Yes.

MR. FUREY: Yes.

MR. HAUT: Yes.

MR. DUBROWSKI: Yes.

(Recess.)

(At 4:30 p.m., a note was received from the jury.)

(In open court; jury present:)

THE COURT: Ladies and gentlemen, I have this note, which reads as follows:

"May we see all photographs in evidence, including newspaper photographs?"

Well, the newspaper photograph was offered in evidence, but it was not received by me, so it is not in evidence. So you have, I believe, all the photographs that are in evidence.

The blueprint plans and the contract between Beaman and Gulf -- I assume you have that, and the sketch of the overhang, as shown on the blackboard -- I assume you have that.

Mr. Spencer's testimony. That presents a problem, because as you may or may not remember, there was a differ-

RKP 49

761

ent stenographer, and we will have to try to track him down to get hold of it.

Is there any particular part of that testimony you have in mind, or do you want the whole of it read?

THE FOREMAN: One of the jurors requested it, so I wrote it in at the same time I was asking for the other evidence.

THE COURT: Is there any particular part of it?

JUROR: The weight bearing on it.

THE COURT: It so happens I can produce that part.

Then you ask for an explanation of the terms in the questionnaire of common law.

You remember, I described two types of liability, one on the contract and the other on what I call the implied warranty of workmanlike service. That is called in common law, so that term "in common law" means the theory of the claim of United Porcelain, the theory of the claim against United Porcelain based upon their implied duty to perform a workmanlike job.

Everything I said in that line is summarized by the expression "at common law".

I will ask the stenographer -- let me ask you now, does anybody wish to say anything at the side bar? I think

RIP 50 762

the juror's question would be answered by reading Mr. Furey's cross-examination. Does anybody have any different views?

MR. FUREY: That would be the entire cross?

THE COURT: I think the entire cross would be best.

JUROR NUMBER 4: Your Honor, I believe I owe an apology to you, sir, and to the foreman of the jury. I was the one who asked for the transcript, a copy of the testimony of Mr. Spencer, but I should have also asked at the same time, which I thought I had, and excuse me for that, of that of Mr. Leavin.

THE COURT: If that is what you would like, I will let you go back and continue deliberations, because that will take, you see, five, ten or fifteen minutes to dig it out of the notes.

I assume -- and when I say I assume, don't take to mean that is what I think you would want, but you probably want the part of Mr. Leavin's testimony that Mr. Furey referred to in his summation.

JUROR NUMBER 4: If I could be accurate, both in terms of Mr. Spencer's and Mr. Leavin's, in terms of what they said the overhang is capable of supporting.

THE COURT: I don't think Mr. Leavin said anything

RKP 51

on that subject.

JUROR NUMBER 4: Then I am out of order.

THE COURT: I will call you back after we given counsel an opportunity to check the testimony and see if there was anything in there that relates to that.

In the meantime, go on with your deliberations.

(The jury left the courtroom to resume deliberating upon a verdict.)

THE COURT: Am I correct that Mr. Leavin said nothing about the capacity of that overhang to support weight?

MR. AUSUBEL: That is correct. He was asked whether he could give any such figures, and he said he couldn't; he was in no position to give any figure.

THE COURT: Let's find that.

MR. FUREY: Mr. Leavin was asked about the propriety of going out on the overhang.

MR. AUSUBEL: Your Honor --

MR. FUREY: Mr. Ausubel, I sat down while you had something to say.

MR. AUSUBEL: I am sorry.

MR. FUREY: The testimony of Mr. Leavin was that it would be foolish for the men to go out on the overhang, contrasted with, I believe, the arguments made by many counsel in closing, with Mr. Spencer's comment about a man could

RKP 52 764

stand on the overhang.

THE COURT: That is what I suggested to him, and he rejected my suggestion.

MR. FUREY: He didn't reject your suggestion. He said he wanted to know about the bearing capacity of the overhang, and your Honor said to him and Mr. Leavin gave no such testimony, and then he said, "I am out of order."

THE COURT: Before I suggested it to him, I had said, "Please don't because of the fact that I am suggesting it means you ought to think this. It seems to me that you probably want the testimony that Mr. Furey referred to in cross-examination." And he said, "No, I want the testimony as to the weight bearing," so I think I have the same impression you do, but we are out of order.

MR. FUREY: I think your impression was correct the first time.

THE COURT: I know, but he said not. I put it to him, and he said it wasn't.

MR. FUREY: Your Honor told him affirmatively that Mr. Leavin gave no such testimony.

THE COURT: That was after he had rejected my suggestions.

MR. FUREY: Since the question has been raised, if any testimony should be reread, it should be reread from

RKP 53 765

both witnesses.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: Would you read back what you have there?

(Record read.)

MR. AUSUBEL: Mr. Leavin said he did not know the tension bearing strength. He was not an engineer or a mathematician, and to get it he would look at a text book.

THE COURT: Read back what happened between me and the juror.

(Record read.)

THE COURT: I have a very strong practice when jurors ask questions to limit the response as narrowly as possible, otherwise I am telling them what I think they ought to hear, not what they want to hear.

MR. FUREY: Your Honor, in this situation, the juror asked specifically for the weight bearing characteristics of the canopy from both of these witnesses, Leavin and Spencer.

The Court said to the juror that Mr. Leavin did not make any such statement. We find from having the testimony read back that Mr. Leavin said it was forty pounds per square foot, and Mr. Spencer's testimony also was that.

RKP 54

THE COURT: Let's hear that statement.

(Record read.)

MR. HAUT: I would submit that question and answer in itself --

THE COURT: I would agree with you. That question and that answer.

MR. FUREY: I think that question was germane, but to put it in context there should be a couple of questions before and after.

MR. DUBROWSKI: Plus the fact that Mr. Leavin said they wouldn't dare go out on this thing because it would be foolish.

THE COURT: The question he asked was the weight bearing capacity.

Ask them to come in.

(Jury present:)

THE COURT: I will begin reading, Mr. Furey, from line 25 on page JW 2. The whole examination isn't necessary.

Ladies and gentlemen, as you will see, this question and answer read back to you will refer back to an earlier question and answer, which we haven't got, but I think it will cover your request, and I think there was some reference to the subject in Mr. Leavin's testimony, which I have forgotten about, so both of those will be read to you.

MR. HAUT: Can your Honor make clear whose testimony that is?

THE COURT: This is Mr. Spencer's testimony. Beginning at line 25 on that page.

(Record read.)

THE COURT: You recollected the untranscribed part. He had given two figures, that for a live load and that for a dead load, and you can remember what that testimony was.

Mr. Leavin's testimony will now be read to you.

(Record read.)

THE COURT: That is all he said about the weight capacity: forty pounds.

The mere fact that this is all you got doesn't mean you can't have more if it doesn't answer your questions.

Incidentally, one thing that I didn't mention to you: if you should ever decide that you are deadlocked and want advice on how to deal with that problem, don't tell me how you stand. If you tell me you are deadlocked five to one, okay, but don't tell me which side the five is on and which side the one is on, for obvious reasons. I might want to discuss with you the problems of resolving your differences if I knew who was ahead, so to speak, and the one that is in the minority can't help but get the impression that I want

RKP 56 768

him to switch or her to switch, but if I just know that there is a deadlock and don't know who is ahead, then I can discuss it without fear of the result.

(The jury left the courtroom to resume deliberating upon a verdict.)

THE COURT: I am instructing the marshal to advise the jury that if they have not reached a verdict by six o'clock, I am going to send them home and have them return tomorrow morning to continue their deliberations. That will alleviate the problem of everybody wanting to call home, and if anybody wants to send a message on that basis you can do it. It will be ten o'clock tomorrow.

(Recess.)

(In open court; jury present.)

THE COURT: Ladies and gentlemen, as I indicated to you, so you could make your plans, if you haven't reached a verdict by six o'clock, I was going to send you home and have you return tomorrow morning at ten o'clock.

In the meantime, don't discuss the case on your way home. If you are riding in a subway together or if for any reason you see each other, don't discuss the case. This jury deliberation is a corporate procedure, and no two or you or any number of you should discuss it without the entire body being present.

RKP 57 769

Needless to say, don't discuss it with anybody else or let anybody talk to you about it.

Tomorrow morning, just come to the jury room, and you can resume your deliberations without any further instructions from me, except don't start deliberating until you are all there. Until you are all there, talk about anything you want except this case.

There will be another proceeding going on in this courtroom, and, as I told you, I will be picking a jury, but that doesn't mean that you still don't have priority. You do.

Any questions that occur to you, you just send in word, exactly as though we were the only people in the courtroom, and proper arrangements will be made.

Good night, and have a good evening.

I will see you tomorrow at ten o'clock.

(Adjourned to February 20, 1974.)

- - -

RKP 58

JAMES V. McLEAN et al

vs

67 Civ 4959

L.P.W. REALTY COMPANY et al.

New York, N. Y.

February 20, 1974 - 10:00 a.m.

(Trial resumed.)

(In open court, in the absence of the jury.)

(Court's Exhibits 1 and 2 marked for identification.)

(At 12:01 p.m., the jury went to lunch.)

- - -

AFTERNOON SESSION

2:00 p.m.

(At 2:15 p.m., a note was received from the jury.)

MR. DWYER: Your Honor, my name is Gerald Dwyer. I am here for Mr. Furey. He had to leave.

THE COURT: I had received the following note from the jury:

"1. As we recall the following, Mr. McLean out of work 14 months, $15,000 medical expense, life expectancy, 14 years. Mr. Linfante out of work eight months, $8,000 medical expenses. Life expectancy 35 years. Are the above facts correct?"

MR. HAUT: That is their province.

RKP 59 771

THE COURT: No. These are facts.

MR. HAUT: It is their recollection of the facts that counts.

THE COURT: But they are asking for them to be confirmed. They are entitled to ask for them to be confirmed if they want them.

Does anybody have any different views?

MR. DUBROWSKI: What were those figures?

THE COURT: McLean, fourteenmonths out of work, $15,000 medical. Do you stipulate to that?

MR. DUBROWSKI: I know, but I don't have the amounts here.

THE COURT: There was a stipulation read into the record. What was that?

MR. AUSUBEL: The stipulation in the record was that the medical expenses for James V. McLean were $1,183.75. He was out of work fourteen months.

THE COURT: So it is not $15,000 but $1,1883.75 medical, and out of work fourteen months.

MR. AUSUBEL: Yes. Out of work fourteen months.

THE COURT: Life expectancy: you have stipulated on that?

MR. AUSUBEL: 14.2 years.

With respect to Mr. Linfante, medical, $1,591.17.

RKP 60

Out of work eight months. Life expectance 32.7 years.

THE COURT: Are there any guide lines to help us consider Questions 2 and 3? That is, what is the amount of damages, and I will just propose to tell them, no, that it is their common sense that controls and not to reward or punish.

Number 3, is Workmen's Compensation pertinent to our discussion? The answer is no.

4, how much money did Mr. McLean sue for? How much money did Mr. Linfante sue for?

My understanding is that that is irrelevant. I have never seen a case that said that, but last time this came up all counsel assured me I would be reversed if I told them what was in the complaint. It seems they all agreed. I didn't look further.

MR. AUSUBEL: I think that specific question may be answered, but the figure which is being sued for is not binding upon the jury.

THE COURT: What is this figure?

MR. DUBROWSKI: I know the plaintiff cannot recover more than he is suing for.

MR. AUSUBEL: That is not true in the Federal Court. It is true in the State Court. There is a Second Circuit case that says that the ad damnum is not binding on the jury.

RKP 61

They can bring in an amount more or less.

MR. DUBROWSKI: All right. So we have a dispute.

THE COURT: That is my recollection.

MR. AUSUBEL: Mr. McLean sued for $375,000. Mr. Linfante sued for $250,000. Ethel McLean, $25,000, and Susan Linfante, $15,000.

THE COURT: I think unless anybody has violent objections I will tell them the law in this Circuit is, it is not relevant, that they are not bound by it.

MR. HAUT: Will your Honor tell them the figures?

THE COURT: No, just not tell them the figures. It seems to me to tell them figures, then tell them it doesn't mean anything has no value.

Ask the jury to come in.

(Jury present:)

THE COURT: Ladies and gentlemen, I have some questions I will take up one at a time.

The first one, as we recall the following, McLean out of work fourteen months. That is correct. Of course that means that is the time he was away from his job. There is a dispute between the parties whether he should have come back earlier or not. Medical expenses, your recollection is off there. The stipulation is $1,883.75. I don't pretend that I remembered it. I had to go to the stipulation.

774

RKP 62

THE FOREMAN: Is it possible to write that in, please?

JUROR NUMBER 4: The figure you just quoted, is that for one?

THE COURT: That is for Mr. McLean.

His life expectancy, you remember, fourteen years. It is 14.2.

Mr. Linfante, out of work eight months. That is correct. Medical expenses, $1,591.17, and I have written that on your question.

Life expectancy, you remember thirty-five. It was 32.7. Of course, that doesn't mean 32.7 years from now he is going to keel over.

Are there any guide lines to help us consider the questions 2 and 3? Well, not really. Questions 2 and 3 are, how much as to each?

As I told you, insofar as you found that his being out of employment was due to the accident, there is a guide line there. You put in the amount he would have earned if he had worked. That is a clear guide line.

The medical expenses, of course, is a clear guide line.

As to pain and suffering and inconvenience and those things, all I can say is what I said before. There is

RKP 63

no way of measuring those things. It is for your sound judgment and common sense, remembering the objective is to recompense the plaintiff as best we can, and we can't recompense him in any way except by cash, and to recompense him as best we can in what you think is sound judgment for the pain, suffering and inconvenience he has suffered, remembering that the purpose is to recompense him, not to reward him, and not to punish any other party. That is the purpose, and that is all I can say on that.

The same way with the actions by Mrs. McLean and Mrs. Linfante. Their action is from the loss, which the law recognizes, for a spouse, the loss of comfort, marital relationship with the injured spounse, and the way it works, if the woman was injured and suing, the husband would be entitled to bring a similar suit, and that, again, of course, there was some money damages mentioned -- I can't remember exactly what they were -- expenses that the respective wives were put to. But beyond that, there is the loss of companionship and, again, there is no guide line except your common sense and your sound judgment, remembering again that the thing is to recompense the plaintiff, not to reward the plaintiff, not to punish any defendant.

Is Workman's Compensation pertinent to our discussions? The answer to that is no. Whether or not Workman's

776

Compensation was received, if so, to what extent, the answer is, no, it has nothing to do with the matter before you. You are not to speculate if they got it, whether they got it. It has nothing to do with this.

The last question is, how much did they sue for?

The law in this Circuit is that that is irrelevant. That is not the custom of the courts in this district, to tell the jurors that amount. The amount they sued for is a figure that their lawyer thought of at the time he was typing it and has no relevance. You can give more or less, and therefore we don't tell you. It is wholly immaterial. It is not what he sued for; it is what you think he ought to get. That applies to all parties.

We will mark this as a Court's exhibit.

(Court's Exhibit 3 marked for identification.)

THE COURT: Any exceptions? If so, at the side bar.

All right. The jury may continue its deliberations.

(At 2:30 p.m., the jury left the courtroom to resume deliberating upon a verdict.)

(Recess.)

(At 2:55 p.m., the jury announced that a verdict had been reached.)

(In open court; jury present.)

RKP 65

THE COURT: Do you gentlemen waive taking the roll of the jury?

MR. AUSUBEL: Yes.

MR. DUBROWSKI: Yes, sir.

THE CLERK: Madam Forelady, has the jury agreed upon a verdict?

THE FORELADY: Yes; we have.

BY THE CLERK:

Q What is your verdict as to Question 1? Do you find a verdict for plaintiff James McLean and plaintiff Joseph Linfante against Gulf?

A Yes; we do.

Q Number 2: If so, in what amount as to each?

A To Mr. James McLean, $50,000. To Mr. Joseph Linfante, $30,000.

Q Number 3: How do you evaluate the damage claim of plaintiffs Ethel McLean and Susan Linfante?

A To Mrs. Ethel McLean $6,000. To Mrs. Susan Linfante $4,000.

Q Do you find a verdict in Gulf's favor against [illegible]aman on contract?

A In contract, yes.

Q And common law?

A At common law, yes.

RKP 66

778

Q Question 5: Do you find a verdict in Gulf's favor against United Porcelain?

A Yes; we do.

Q Question 6: The answers to Questions 4 and 5 being "Yes", do you apportion the damages as between Gulf and either or both of the other parties? As to Gulf?

A Gulf, 35 per cent.

Q At to Beaman?

A 35 per cent.

Q As to United Porcelain?

A United Porcelain, 30 per cent.

THE CLERK: Ladies and gentlemen of the jury, you have heard your verdict as it stands recorded, and so say you all?

MR. DUBROWSKI: May we poll the jury individually, just as to all six questions at one time? That is, instead of individually?

THE COURT: Read all the questions to them, and then ask them individually if that is their answer.

THE CLERK: Number 1: Do you find a verdict for plaintiff James L. McLean and plaintiff Joseph Linfante against Gulf? Your answer is yes.

Number 2: If so, in what amount as to each?

As to James McLean, $50,000. As to Joseph Linfante,

779

RKP 67

$30,000.

Question 3: How do you evaluate the damage claims of plaintiffs Ethel McLean and Susan Linfante?

Ethel McLean, $6,000. Susan Linfante, $4,000.

Question 4: Do you find a verdict in Gulf's favor against Beaman in contract?

Yes.

At common law?

Yes.

Question 5: Do you find a verdict in Gulf's favor against United Porcelain?

Yes.

Question 6: The answers to Questions 4 and 5 being "Yes", have you apportioned the damages as between Gulf and either or both of the other parties?

Gulf, 35 per cent; Beaman 35 per cent; United Porcelain 30 per cent.

(Each juror, upon being asked if the verdict as recorded was his or her verdict, answered affirmatively.)

THE COURT: Any motions before the jury leaves?

MR. AUSUBEL: None on the part of the plaintiff.

MR. DUBROWSKI: No, your Honor.

THE COURT: Ladies and gentlemen, I want to thank you for your services. It is not my practice to comment on

RKP 68

a verdict, because it is not my business how the jury decides, beforehand, and it doesn't become my business after the event, but I do want to thank you for the obvious care you took with this case. This was demonstrated not only by my observations of your attention during the trial, but the manner in which you asked questions and conducted deliberations after the trial, and I just hope that you got the satisfaction to which you are entitled for having contributed to the administration of justice in this District.

Thank you, ladies and gentlemen. You are excused with the thanks of the Court.

(The jury left the courtroom.)

THE COURT: We will mark the verdict as a Court's exhibit.

(Court's Exhibit 4 marked for identification.)

MR. HAUT: May I respectfully move the Court on the same grounds as I have previously asked the Court for a directed verdict or for a dismissal, to the effect that I suggest respectfully that the verdicts are inconsistent in that a verdict for the plaintiffs makes clear that they were free from contributory negligence, and since the only employees on the premises were the plaintiffs themselves, any negligence on their part -- any negligence on the part of United Porcelain could only have come through the plaintiffs

themselves. Therefore, I suggest it is inconsistent for the jury to have found a verdict in favor of the plaintiffs and at the same time to have found a verdict against United Porcelain, and this being the case and being against the credible weight of the evidence, there being no evidence whatsoever that there was any extraneous negligence on the premises with respect to scaffolding or whatever you have on this job site, it being crystal clear that as far as the overhang and the work were concerned, this was properly performed, and this, again, is a verdict against the weight of the credible evidence and also an inconsistent verdict.

MR. DUBROWSKI: I renew all motions made at the end of the plaintiffs' case and at the end of the entire case.

I move to set aside the verdict as to each and every one of the plaintiffs as being against the weight of the credible evidence. I move to set aside the verdict on behalf of each and every one of the defendants as being against the weight of the law.

I move to set aside the verdict for each and every one of the plaintiffs as being excessive and, finally, I move that Item Number 3, Mrs. McLean and Mrs. Linfante, of course, there has been no claim made by the third-party defendant against Beaman that those things be not considered

RKP 70

782

as to Beaman.

THE COURT: The last part --

MR. HAUT: I will join in that motion.

THE COURT: That part, I gather from the pleadings, is correct.

MR. HAUT: That there is no recovery over for those elements.

THE COURT: That is my understanding.

MR. DUBROWSKI: I have three other things. I request fifteen days to make any written motion concerning the verdict and the charge. I request thirty days to make a case and sixty days stay of execution.

MR. HAUT: May I clarify one thing: since we are not involved in the claim over in Item Number 3, I take it, sir -- and do I take it correctly? -- the apportionment which we will be involved in -- and I speak both for Beaman and myself -- the figures in Number 2, $50,000 and $30,000, so the percentages we are paying are the figure of $50,000 and $30,000, which is $80,000.

THE COURT: That doesn't follow.

MR. HAUT: We are not paying for Item 3.

THE COURT: My understanding of this field of the law, which I think somebody in this District probably has more knowledge on -- but my understanding is that Item 6

RKP 71

relates to both 2 and 3 and has nothing to do with the claim over.

MR. HAUT: We are not liable for Item 3.

THE COURT: I understand, but my understanding of the apportionment comes as a result of the claim against Gulf.

I don't have to rule on that now. That is my understanding. You have made your position clear.

MR. DWYER: Your Honor, the first thing, the request for fifteen days for a motion and thirty days to make a case and a sixty-day stay on the execution -- will you grant that?

THE COURT: I don't see why there should be a stay on the execution. This case has been going on for --

MR. DWYER: If we are going to make a motion on the verdict and the motion is persuasive to the Court and we have already paid it, it would create some problems.

If the verdict is attacked on the motion, the judgment should be stayed until the decision.

THE COURT: I suppose there is no question of your getting the interest on it.

You have no violent objection to that?

MR. AUSUBEL: I am not going to raise a violent objection about fifteen days. I am not worried about Gulf

Oil Company taking off.

MR. DWYER: Thank you.

On behalf of Gulf Oil Company, I renew all the motions made at the end of the case.

THE COURT: I see no possibility of Gulf succeeding in any motion directed to the verdict as against it.

On the claim over, the claims over, it seems to me there is a possibility, a fairly good possibility of United prevailing as against Gulf and a reasonable possibility of Beaman prevailing, especially on the contract phase of it. However, my suggestion to you gentlemen is to stop wasting the time of the Court and that you settle this case as among yourselves.

This case has wasted more time, more judicial time than any case I have ever seen, either on or off the bench, and I suggest you stop it.

MR. DWYER: Your Honor, if I might continue with my motions --

THE COURT: Yes.

MR. DWYER: On behalf of Gulf, I move to set aside the verdict as against the weight of the credible evidence, and I move for a judgment notwithstanding the verdict in regard to the action for indemnity against Beaman, and I make the same --

RKP 73

785

THE COURT: What do you mean, notwithstanding the verdict? You got a verdict.

MR. DWYER: That is correct. However, they have found in favor of Gulf against Beaman on contract, and contract entitles Gulf to 100 per cent indemnification against Beaman.

THE COURT: I understand that.

MR. DWYER: I am now asking for judgment on the contract for 100 per cent indemnification on the verdict as found against Gulf.

MR. DUBROWSKI: I oppose that based on the answers to Number 6.

THE COURT: As between Gulf, Beaman and United Porcelain, I am amenable to taking any briefs that you may want to submit. I will take any briefs that Gulf may offer against plaintiffs, but I am telling you, I think it is a waste of time. I don't see any possible grounds for setting aside the verdict.

MR. DWYER: I am not familiar with the trial, but the thrust of it would be on the finding in favor of Gulf in favor of Beaman on contract.

THE COURT: On that I am completely in doubt as to the propriety of the verdicts as between Gulf, Beaman and United Porcelain, and I will take briefs on that.

RKP 74

786

MR. DUBROWSKI: When do you want the brief? Two weeks?

THE COURT: Work out your own schedule, but I strongly advise you to stop wasting the Court's time and settle it. This case is the most badly prepared case I have ever seen, especially on Gulf's part. The evidence shows that Gulf never even went to the premises to find out what happened.

On the basis of my present knowledge, I can see that a reasonably competent person looking at these photographs could have told you what happened, and the case should have been disposed of in a two-hour conference. It has wasted God knows how much pre-trial time and over a week's time during trial because Gulf never took the trouble to find out what had happened.

MR. DWYER: There has never been any doubt as to Gulf knowing what happened. They had a right to indemnification on the contract.

THE COURT: I am saying they didn't take the trouble to find out how physically the accident happened.

MR. DWYER: How would you know that?

THE COURT: All you have to do is look at the pictures.

MR. DWYER: Maybe they saw the pictures and knew

RKP 75

very well what happened.

THE COURT: Why didn't they settle the case?

MR. DWYER: I have a right to be indemnified.

THE COURT: Whether you have a right or not, you did not know how the accident happened, and you didn't find out how the accident happened until the last question on the last day, and it has been the most disgraceful performance I have ever seen, on or off the bench, and I strongly urge you to stop wasting the Court's time and get this case settled.

MR. DUBROWSKI: I respectfully disagree with the Court's opinion.

THE COURT: I assumed you would.

MR. DUBROWSKI: Not always, but in this case I do.

THE COURT: That opinion was not calculated to draw agreement from defense counsel.

MR. DUBROWSKI: We have all been led to one story on the happening of the accident from the examinations before trial.

THE COURT: The plaintiffs had absolutely no way of knowing what caused this accident. Anybody looking at these pictures and asking one question of Mr. Spencer could have told you.

MR. DUBROWSKI: Who had the pictures? Not the

RKP 76 788

defendants.

THE COURT: That is why. What kind of defendants are they to have an accident on the premises and not take a picture?

MR. DUBROWSKI: We are from Maryland.

THE COURT: I don't care. You are the contractor.

MR. HAUT: I think your Honor is correct about settling this thing.

THE COURT: And get on to something else.

- - -

Memorandum and Order.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

KNAPP, D. J.:

The plaintiffs in this action were working on the installation of an "overhang" on a Gulf service station when the overhang tore loose from its moorings and hurled plaintiffs to the ground to their considerable damage. So far as relevant to this motion, the parties —other than plaintiffs—are: Gulf Oil Company, the owner[1] of the service station; Beaman Corporation, which had contracted with Gulf to build and install the overhang, and to indemnify it from any liability that might result from such work; and United Porcelain Co., Inc., which had contracted with Beaman to provide the labor for the installation. Plaintiffs' suit, in negligence, was against Gulf. Gulf claimed over against Beaman on its indemnity. Beaman asserted a further claim over against United Porcelain on its implied warranty of good workmanship.

So far as here relevant, the jury found: that Gulf was negligent and that plaintiffs were wholly free of contributory negligence; that Beaman was liable over to Gulf on its indemnity agreement; and that negligence imputed to United Porcelain rendered it liable over to Beaman.[2]

United Porcelain, at the close of the evidence, had moved for a directed verdict on the ground that any

---

[1]Actually Gulf was a tenant under a long-term lease, but for purposes of this motion it may properly be treated as the owner.

[2]The jury limited United Porcelain's liability to 30% and Beaman seeks to have it increased to 100%. In view of the disposition of United Porcelain's motion, Beaman's said claim becomes moot.

verdict against Gulf would necesarily presuppose exoneration of United Porcelain's employees (the plaintiffs) from any negligence, and that such exoneration of its employees would necessarily free it of liability. Now that the jury has specifically made the findings of exoneration, United Porcelain renews its motion.

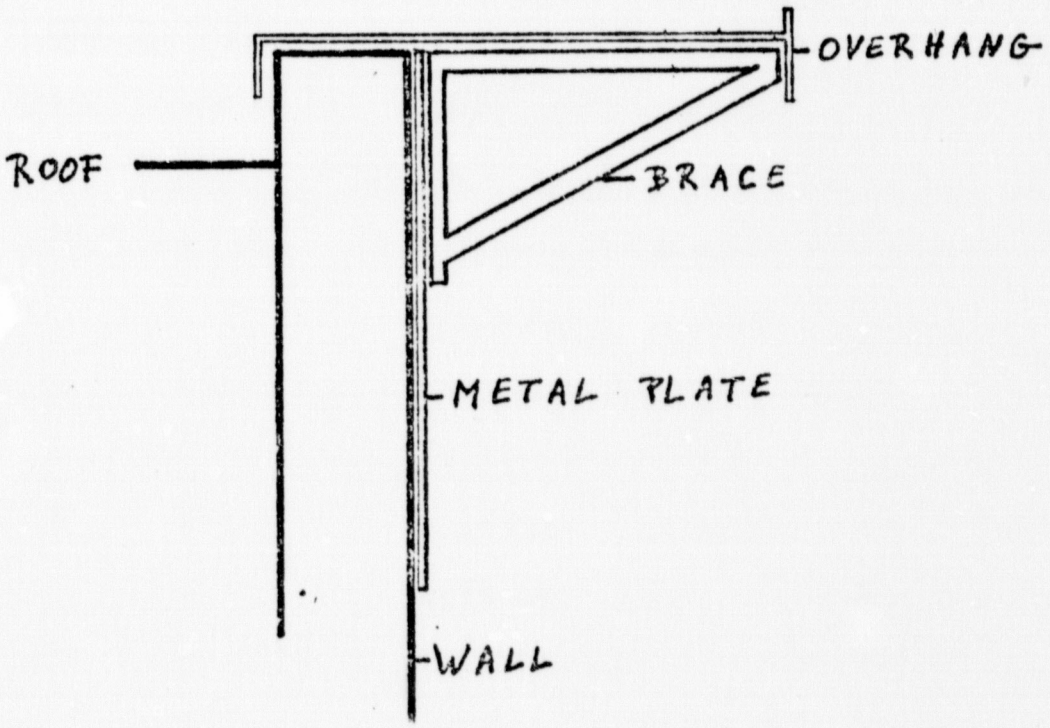
The essential facts are simple. Gulf, like several other oil companies, was in the late sixties engaged in a program of beautifying its service stations. So far as here relevant, the program included the installation of an "overhang" over at least one facade of the station. This "overhang" was placed over the top of building's wall and extended about two feet from the face of the wall. (There were other facets to the beautification program, but this opinion will treat the matter as though only the overhang were involved.)

The method of operation as between the three defendant companies was as follows: Gulf had a master contract with Beaman providing for the installation of these overhangs at a fixed schedule of prices. When Gulf decided to beautify a particular station, it would notify Beaman, and an architect would be sent to prepare a blueprint. The record is not clear as to whether the architect was employed by Gulf or Beaman. In any event, each received a copy of the blueprint and the name of each appeared thereon. Some time after receiving the blueprint, Gulf would direct Beaman to proceed and Beaman would manufacture the overhang and direct United Porcelain to install it. United Porcelain performed no function except supply the labor to do the installing. All design and engineering was completed before United Porcelain was called into the situation.

The method of installation was simple. The overhang never became a structural part of the building, but was merely placed over the top of one of the walls and was attached thereto and supported by triangular metal braces. The braces, in turn, were affixed to the wall in a simple

manner. Metal plates were attached to the wall by rivets driven deep into the masonry, and the braces in turn were riveted to the metal plates. The function of the metal plates was obviously to distribute the weight of the overhang over the entire surface of the plates rather than having the weight rest solely on rivet points in the wall.

A cross-section of the completed assembly would look as follows:



It can readily be observed that it is essential to the stability of the above-pictured structure that the top of the triangular brace upon which the overhang rests be flush with the top of the supporting metal plate.

Beaman and United Porcelain (acting for Gulf and various other oil companies) had—prior to the instant accident—installed some seventy such overhangs in routine fashion and without incident. The instant installation presented a problem in that the gas station's wall was surmounted by a concrete coping which extended an inch or two over the edge of the wall, preventing the necessary flush relationship between the triangular brace and its supporting metal plate. Any competent professional who carefully examined the wall would have realized that the above-described standard procedures were inappropriate. It would obviously have been impossible to install the metal plate (which must adhere to the wall) in such a manner that its top would be level with the top of the coping. It could only extend to the bottom of the coping (see Exhibit 14G-1). Consequently, either the coping would have to have been removed so that the overhang assembly would be flush with the top of the wall, or an additional element—of the same depth as the coping—would have to have been supplied for insertion between the triangular brace and the overhang so that the top of the brace could have been level with the top of the metal plate to which it was attached. In such situation it would have been the new element upon which the overhang actually rested.

However, the architect's blueprints do not signal the problem, and Beaman delivered to United Porcelain the overhang's normal components, with no indication that they should be dealt with in anything but routine fashion.[3]

Plaintiffs, acting on United Porcelain's behalf and apparently following the blueprints as best they could,

---

[3]The witnesses who testified concerning the blueprint seem to have been in doubt as to whether it showed the coping. In any event, Gulf is clearly chargeable with knowledge of the structure of its own building, and the blueprint should have made clear that some modification of the standard design was required to take into account the problem posed by the coping.

installed the triangular braces by driving the top two rivets *not* into the weight-distributing metal plates, but into the ornamental coping (see Exhibit 14G-1).

Not unpredictably, when the plaintiff workmen put their weight on the overhang in the course of installing lights on its outer edge, the coping gave way and the whole structure collapsed (see Exhibit 14G-1). Testimony offered by Beaman established that the man's weight on the overhang could not possibly have caused the accident had the overhang been properly installed.

The cause of the accident being obvious, two basic questions were put before the jury:

(1) Was Gulf negligent in failing to warn the plaintiffs of the danger inherent in installing the overhang in accordance with the blueprint; and

(2) Were plaintiffs negligent in not themselves perceiving the danger, or were they justified in simply following instructions given them by Gulf and Beaman?

The jury answered both questions in plaintiffs' favor.

United Porcelain takes the position that since the jury exonerated its employees (i. e. plaintiffs) of negligence, there is no basis for imputing negligence to it (United Porcelain). Beaman counters with the contention that the jury had the right to find United Porcelain negligent in failing to provide its employees with scaffolding on which they could have stood while doing their work rather than working from the top of the overhang. Had they been standing on a scaffold their weight could not, of course, have caused the overhang to fall.

There seem to be two conclusive answers to Beaman's contention. First, the only purpose in providing a scaffold would have been to guard against the danger of plaintiffs falling *off* the overhang. Assuming proper construction (upon which assumption the jury found plaintiffs en-

titled to rely), there would have been no other danger to guard against. But there appears never to have been any danger of their falling off, at least no such danger eventuated. It follows that United Porcelain's negligence, if any, had no part in causing the accident. See *Firman v. Sacia* (3d Dept. 1959) 184 N. Y. S. 2d 945; *Bolsenbrook v. Tully & DiNapoli, Inc.* (1st Dept. 1961) 212 N. Y. S. 2d 323, aff'd 10 N. Y. 2d 960; *O'Brien v. Fallmore Cab* (2d Dept. 1963) 239 N. Y. S. 2d 380, aff'd (1964) 15 N. Y. 2d 648.

In the second place, plaintiffs' evidence and evidence offered by Beaman established that it had not been the practice to employ scaffolds on the seventy prior jobs upon which United Porcelain and Beaman had worked, and that Beaman was aware of this practice. There is no suggestion that Beaman ever requested the use of scaffolds. Indeed, the witness for Beaman was specifically asked whether such a request had been made and testified that he had no knowledge of any having been made. In the circumstances, Beaman is in no position to impute negligence to United Porcelain on the ground that it had followed its ususal procedures in the instant case.

United Porcelain's motion for judgment notwithstanding the verdict is accordingly granted, and the claim-over is dismissed as to it.

Beaman has also made a motion. It asks that Gulf's complaint against it be dismissed on the ground that its indemnity contract only came into effect if the "workmanship" (i. e., the labor supplied by United Porcelain) should prove defective. In the first place, I find this contention untenable as a matter of law. In the second place, the contention was submitted to the jury and rejected. Beaman's motion is accordingly denied.

The parties have not found it expedient to order the stenographer's minutes. As counsel may have observed, I am not a note taker. The above is therefore largely based on my unaided recollection. If any party wishes

to procure the stenographer's minutes and call to my attention any material misapprehension of the evidence, a motion for reargument may be made at any time within thirty (30) days.

So Ordered.

Dated: New York, New York
May 7, 1974.

WHITMAN KNAPP,
U. S. D. J.

Supplemental Memorandum.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

KNAPP, D. J.:

In an accompanying opinion I have disposed of motions by Beaman and United Porcelain. After the jury returned its verdict, Gulf made a motion to set it aside on the ground that the theory upon which the case was submitted to the jury was inconsistent with the pre-trial order. Since there can be no doubt that such theory was totally inconsistent the matter should come before the Court of Appeals—for me briefly to indicate my reasons for denying Gulf's motion.

The peculiar thing about this case is that although in retrospect the cause of the accident—as set forth in the accompanying opinion is clear, counsel for none of the parties seem to have so much as suspected it during any of the six years this litigation was pending. The cause

did not become apparent to me until after the last witness, produced by Beaman, had been cross-examined by Gulf. Consequently, all sorts of irrelevant issues had been made the subject of endless pre-trial discovery and of trial testimony. The most hotly contested issue was exactly where on the overhang plaintiffs had been standing (or kneeling) at the time of the accident. It was the thrust of all defense efforts to establish that the accident was caused by plaintiffs' negligence in placing their weight too far out on the overhang. It was not until the last several questions asked by Gulf of the Beaman officer called by Beaman that it was conclusively established that a properly installed overhang would easily have supported the weight of both plaintiffs standing on the overhang's extreme outer edge, and consequently that plaintiffs' negligence—or lack of it—in positioning themselves on the overhang had no more bearing on this litigation than what the plaintiffs had had for breakfast on the morning of the accident. In consequence of failure to understand the cause of the action, no counsel addressed a single question to plaintiffs on what would appear to be the only viable issue in the case: how could plaintiffs—two highly skilled workmen—have installed some 70 of these overhangs without coming to some realization of the purpose served by the metal plates to which the triangular bases were supposed to be attached; and if they did know the function of these metal plates, how could they have failed to realize that it would have been foolish—not to say suicidal—to drive the top two rivets (presumably the most important) into unprepared concrete (i. e., the coping) rather than into the metal plates?

As above indicated, the real issue in the case was finally revealed by the final questions asked by Gulf of the last Beaman witness. Those questions were asked between 4:00 and 4:15 Thursday evening, whereupon court was adjourned for summations and charge on the following Monday.

Supplemental Memorandum

The significance of the Beaman testimony having sunk in over the weekend, a conference was held in the robing room at which the true cause of the accident was discussed. It was then suggested that the parties make one final effort to settle, and a forty-five minute adjournment was granted to permit counsel to confer with their clients. The settlement efforts went for naught.

The parties then summed up, the plaintiff arguing to the jury on the basis of the newly established theory of causation. No one objected to plaintiffs' summation on the ground that it was at variance with the pre-trial order. Had any party claimed surprise at the robing room conference—or perhaps even when plaintiffs stated their theory on summation—I would certainly have granted an application to reopen plaintiffs' cross-examination, and might even have granted a reasonable adjournment despite defendants' six-year sleep at the switch. However, it seemed to me then—as it does now—that defendants' failure to object at either of these times authorized me, in my discretion, to consider the variance to have been waived. See *Bucky v. Sebo* (2d Cir. 1953) 208 F. 2d 304, 305.

In the course of post-trial arguments, defendants argued that plaintiffs should be faulted for their failure to ascertain the true cause of the accident. I can't accept that argument. While it is true that plaintiffs might have ferreted out the cause by diligent use of pre-trial discovery, defendants Gulf and Beaman (that is the clients, not the lawyers) were, by hypothesis, all along in at least constructive possession of the information. Gulf is chargeable with knowledge of the structure of its building. Beaman certainly with knowledge of the engineering requirements of the overhang it designed and manufactured. There is nothing in the rules of civil procedure which required Beaman to conceal its knowledge until the final witness took the stand after six years of litigation. Indeed, the extraordinary thing about this case is that after a bizarre and nearly fatal accident involving both Gulf and Beaman, neither of

them—so far as the record indicates—even showed enough interest to send anyone to the scene to find out what had happened.

Let these remarks be made part of the record.

So Ordered.

Dated: New York, New York
May 7, 1974.

WHITMAN KNAPP,
U. S. D. J.

Judgment Appealed From, Entered March 22, 1974.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

This action came on for trial before the Court and the jury, Honorable Whitman Knapp, U. S. District Judge presiding, and the issues having been duly tried and the jury having duly rendered its verdict, it is

ORDERED AND ADJUDGED that the plaintiff, James V. McLean, recover of the defendant, Gulf Oil Corporation, the sum of Fifty Thousand Dollars ($50,000.00), together with interest rate of 6% per annum from February 20, 1974 to the date of judgment, to wit, One Hundred Six Dollars and Seventy-Six Dollars and Seventy Six Cents ($106.76), making a total of Fifty Thousand One Hundred Six Dollars and Seventy Six Cents ($50,106.76), and it is further

ORDERED AND ADJUDGED that the plaintiff, Ethel McLean, recover of the defendant, Gulf Oil Corporation, the sum of Six Thousand Dollars ($6,000.00) together with interest

Judgment Appealed From, Entered March 22, 1974

rate of 6% per annum from February 20, 1974 to the date of judgment, to wit Twelve Dollars and Eighty-Seven Cents ($12.87) making a total of Six Thousand Twelve Dollars and Eighty-Seven Cents ($6,012.87), and it is further

ORDERED AND ADJUDGED that the plaintiff, Joseph Linfante, recover of the defendant, Gulf Oil Corporation, the sum of Thirty Thousand Dollars ($30,000.00) together with interest at a rate of 6% per annum from February 20, 1974 to the date of judgment, to wit, Sixty Four Dollars and Nine Cents ($64.09) making a total of Thirty Thousand Sixty Four Dollars and Nine Cents ($30,064.09), and it is further

ORDERED AND ADJUDGED that the plaintiff, Susan Linfante, recover of the defendant, Gulf Oil Corporation, the sum of Four Thousand Dollars ($4,000.00), together with interest rate of 6% per annum from February 20, 1974 to the date of judgment, to wit, Eight Dollars and Fifty-Eight Cents ($8.58) making a total of Four Thousand Eight Dollars and Fifty-Eight Cents ($4,008.58) together with interest as provided by law and cost when taxed and made out to defendant, L.P.W. Realty Company, and Joseph James, Inc., the plaintiffs taking nothing and that the action be dismissed as to them under merits without costs, and it is further

ORDERED AND ADJUDGED that the defendant and third party plaintiff, Gulf Oil Corporation, recover in full of the third party defendant, Beaman Corporation, the amounts paid by it to the plaintiff, James V. McLean, Ethel McLean, Joseph Linfante and Susan Linfante, on the cause of action for indemnity pursuant to written contract, and it is further

ORDERED AND ADJUDGED that the defendant and third party plaintiff, Gulf Oil Corporation recover 35% of the

sum paid to the plaintiffs, James V. McLean, Ethel McLean, Joseph Linfante, and Susan Linfante, on account of the common-law cause of action for contribution and the defendant and third party plaintiff, Gulf Oil Corporation, recover of third party defendant, United Porcelain Co., Inc., 30% of the sum paid to the plaintiffs, Joseph V. McLean, Ethel McLean, Joseph Linfante and Susan Linfante, and it is further

ORDERED AND ADJUDGED that the third party plaintiff, Gulf Oil Corporation, recover against Beaman Corporation, in the amount of reasonable attorney's fees to be assessed after a hearing.

Dated: Hempstead, New York
March 5, 1974

U. S. D. J.

Notice of Appeal by Defendant Gulf Oil Corp. From Judgment Entered March 12, 1974.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SIRS:

Notice is hereby given that Gulf Oil Corporation, one of the defendants and the third-party plaintiff above named hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment and each and every part thereof, including the dismissal of the cross-complaint against Joseph James, Inc., entered in this action on March 12, 1974.

Dated: Hempstead, New York
April 16, 1974

FUREY & MOONEY,
JAMES M. FUREY
Attorneys for Defendant and Third-Party Plaintiff Gulf Oil Corporation
Office and P. O. Address
600 Front Street
Hempstead, New York 11550

To:

Clerk, United States District Court
Southern District of New York

Berman & Frost
Attorneys for Plaintiffs
77 Water Street
New York, New York 10005

L. Louis Winokur
Attorneys for Defendants
L.P.W. Realty and Lawrence Paul Wolf
88-02 Sutphin Boulevard
Jamaica, New York 11435

Notice of Appeal by Defendant Gulf Oil Corp. From Judgment Entered March 12, 1974

A. Allen Stanger
Attorney for Defendant
Joseph James
10 Columbus Circle
New York, New York 10019

Alexander, Ash, Schwartz & Cohen,
Attorneys for Third-Party Defendant
United Porcelain Co., Inc.
801 Second Avenue
New York, New York 10017

John P. Connors,
Trial Counsel to Attorney for Third-
Party Defendant, Beaman Corporation
27 William Street
New York, New York 10005

Cross-Notice of Appeal of Defendant Joseph James From Judgment Entered March 12, 1974.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SIRS:

Please Take Notice that the defendant Joseph James, Inc. hereby cross-appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on March 12, 1974 insofar as it dismisses the cross-claim of the said Joseph James, Inc.

Dated: New York, New York
April 24, 1974

Yours, etc.

A. ALLEN STANGER
Attorney for Defendant
Joseph James, Inc.
By: LEWIS I. WOLF
Office & P. O. Address
10 Columbus Circle
New York, New York 10019
Tel. No. 957-4023

To:

Clerk, United States District Court
Southern District of New York

Furey & Mooney, Esqs.
Attorneys for Defendant-Third Party Plaintiff
Gulf Oil Corporation
600 Front Street
Hempstead, New York 11550

Cross-Notice of Appeal of Defendant Joseph James From Judgment Entered March 12, 1974

To:

Berman & Frost, Esqs.
Attorneys for Plaintiffs
77 Water Street
New York, N. Y. 10005

L. Louis Winokur, Esq.
Attorney for Defendants
L.P.W. Realty & Lawrence Paul Wolf
88-02 Sutphin Boulevard,
Jamaica, New York 11435

Alexander, Ash, Schwartz & Cohen, Esqs.
Attorneys for Third Party Defendant
United Porcelain Co. Inc.
801 Second Avenue
New York, New York 10017

John P. Connors, Esq.,
Trial Counsel to Attorney for Third
Party Defendant Beaman Corporation
27 William Street
New York, New York 10005

Notice of Appeal of Third-Party Defendant Beaman Corporation From Judgment, Entered March 12, 1974.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SIRS:

Notice is hereby given that Beaman Corporation, one of the third-party defendants above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment and each and every part thereof, entered in this action on March 12, 1974.

Dated: New York, April 2, 1974.

JOHN P. CONNORS,
Trial Counsel to Attorney for Third Party Defendant, Beaman Corporation
Office & P. O. Address
27 William Street
New York, New York 10005

To:

Clerk, United States District Court
Southern District of New York

Berman & Frost, Esqs.
Attorneys for Plaintiffs
77 Water Street
New York, New York 10005

Notice of Appeal of Third-Party Defendant Beaman Corporation From Judgment, Entered March 12, 1974

To:

Furey & Mooney, Esqs.
Attorneys for Defendant & Third
Party Plaintiff, Gulf Oil Corporation
600 Front Street
Hempstead, New York 11550

L. Louis Winokur, Esq.
Attorney for Defendant
L.P.W. Realty and Lawrence Paul Wolf
88-02 Sutphin Boulevard
Jamaica, New York 11435

A. Allen Stanger, Esq.
Attorney for Defendant
Joseph James
10 Columbus Circle
New York, New York 10019

Alexander, Ash, Schwartz & Cohen, Esqs.
Attorneys for Third-Party Defendant,
United Porcelain Co., Inc.
801 Second Avenue
New York, New York 10017

Amended Judgment, Entered May 22, 1974.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

This action having come on for trial before the Court and the jury, Honorable Whitman Knapp, United States District Judge presiding and the issues having been duly tried and the jury having duly rendered its verdict and this Court having signed a judgment on March 7, 1974 and the Clerk of the Court having entered the same on March 14, 1974 and the third-party defendant, United Porcelain Co., Inc., having moved by notice of motion, returnable on March 15, 1974, and served upon all counsel by mail on March 8, 1974 for an order setting aside the verdict in favor of the defendant and third-party plaintiff against the third-party defendant and the judgment entered thereon and for judgment dismissing the third-party complaint of Gulf Oil Corporation and the cross-claim of Beaman Corporation and the third-party defendant, Beaman Corporation, having moved by notice of motion, dated March 15, 1974 to set aside the verdict in favor of the third-party plaintiff, Gulf Oil Corporation, against the third-party defendant, Beaman Corporation, and for a direction of a verdict in favor of the third-party defendant, Beaman Corporation, against the third-party defendant, United Porcelain Co., Inc., on the former's cross-claim and the Court having received the affirmation of James M. Furey, dated March 11, 1974, in opposition to the motion of United Porcelain Co., Inc., and also the affirmation of James M. Furey, dated March 15, 1974, in opposition to the motion of the third-party defendant, Beaman Corporation, and the affidavit of Irwin H. Haut, sworn to the 29th day of March, 1974, in support of the motion of United Porcelain Co., Inc., and in opposition to the cross-motion of the third-party defendant, Beaman Corporation, for judgment in its favor against United Porcelain Co.,

Inc., on the former's cross-complaint and after due deliberation this Court having handed down its memorandum and order, dated May 7, 1974 and filed May 8, 1974 and the supplemental memorandum of May 7, 1974 and filed May 8, 1974 and by said memoranda and order having granted the motion of United Porcelain Co., Inc., and having denied the motion of the third-party defendant, Beaman Corporation, it is

ORDERED AND ADJUDGED that the judgment dated March 7, 1974 be amended in accordance with the aforesaid memorandum and order of May 7, 1974 and the supplemental memorandum of May 7, 1974 and therefore it is

ORDERED AND ADJUDGED that the plaintiff, James V. McLean, recover of the defendant, Gulf Oil Corporation, the sum of Fifty Thousand Dollars ($50,000.00), together with interest rate of 6% per annum from February 20, 1974 to the date of judgment, to wit, One Hundred Six Dollars and Seventy-six Cents ($106.76) making a total of Fifty Thousand One Hundred Six Dollars and Seventy-six Cents ($50,106.76), and it is further

ORDERED AND ADJUDGED that the plaintiff, Ethel McLean recover of the defendant, Gulf Oil Corporation, the sum of Six Thousand Dollars ($6,000.00) together with interest rate of 6% per annum from February 20, 1974 to the date of judgment, to wit Twelve Dollars and Eighty Seven Cents ($12.87) making a total of Six Thousand Twelve Dollars and Eighty-seven Cents ($6,012.87), and it is further

ORDERED AND ADJUDGED that the plaintiff, Joseph Linfante, recover of the defendant, Gulf Oil Corporation, the sum of Thirty Thousand Dollars ($30,000.00) together with interest at a rate of 6% per annum from February 20, 1974 to the date of judgment, to wit, Sixty-four Dollars and Nine Cents ($64.09) making a total of Thirty

Thousand Sixty-four Dollars and Nine Cents ($30,064.09), and it is further

ORDERED AND ADJUDGED that the plaintiff, Susan Linfante, recover of the defendant, Gulf Oil Corporation, the sum of Four Thousand Dollars ($4,000.00), together with interest rate of 6% per annum from February 20, 1974 to the date of judgment, to wit, Eight Dollars and Fifty-eight cents ($8.58) making a total of Four Thousand Eight Dollars and Fifty-eight cents ($4,008.58) together with interest as provided by law and cost when taxed; and as to defendant, L.P.N. Realty Company, and Joseph James, Inc., the plaintiffs take nothing and the action be dismissed as to them on the merits and without costs, and it is further

ORDERED AND ADJUDGED that the defendant and third-party plaintiff, Gulf Oil Corporation, recover in full of the third-party defendant, Beaman Corporation, the amounts paid by it to the plaintiff, James V. McLean, Ethel McLean, Joseph Linfante and Susan Linfante, on the cause of action for indemnity pursuant to written contract, and it is further

ORDERED AND ADJUDGED that the defendant and third-party plaintiff, Gulf Oil Corporation, recover of the third-party defendant, Beaman Corporation, 35% of the sum paid to the plaintiffs, James V. McLean, Ethel McLean, Joseph Linfante and Susan Linfante, on account of the common law cause of action for contribution and it is further

ORDERED AND ADJUDGED that the third-party plaintiff, Gulf Oil Corporation, recover from Beaman Corporation the amount of reasonable attorneys' fees to be assessed after a hearing and it is further

ORDERED AND ADJUDGED that the third-party complaint of Gulf Oil Corporation and the cross-claim of the third-party defendant, Beaman Corporation, against

Notice of Appeal of the Third-Party Defendant Beaman Corporation From Amended Judgment Entered May 22, 1974

United Porcelain Co., Inc., be dismissed on the merits and that the third-party defendant, United Porcelain Co., Inc., have judgment against Gulf Oil Corporation for costs and disbursements of this action.

Dated: New York, New York
May 15, 1974

WHITMAN KNAPP
U. S. D. J.

Judgment Entered—5-22-74
RAYMOND F BURGHARDT

Notice of Appeal of the Third-Party Defendant Beaman Corporation From Amended Judgment Entered May 22, 1974.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SIRS:

Please Take Notice that third-party defendant Beaman Corporation herein appeals to the United States Court of Appeals for the Second Circuit from the amended judgment of the United States District Court for the Southern District of New York in this action entered on May 22, 1974 which judgment ordered and adjudged that plaintiff James V. McLean recover $50,106.76, that plaintiff Ethel McLean recover $6,012.87, that plaintiff Joseph Linfante recover $30,064.09 and that plaintiff Susan Linfante recover $4,008.58, all said plaintiffs to recover their respective amounts together with interest

Notice of Appeal of the Third-Party Defendant Beaman Corporation From Amended Judgment Entered May 22, 1974

and costs against Gulf Oil Corporation, and further ordered and adjudged the dismissal of plaintiffs' actions against defendants L.P.W. Realty Company and Joseph James, Inc. and further ordered and adjudged that Gulf Oil Corporation recover in full against third-party defendant Beaman Corporation the amounts paid to the plaintiffs, and further ordered and adjudged that Gulf Oil Corporation recover against the third-party defendant Beaman Corporation 35% of the sums paid to the plaintiffs on the common law cause of action for contribution plus attorneys' fees, and further ordered and adjudged that the third-party complaint of Gulf Oil Corporation and the cross-claims of third-party defendant Beaman Corporation be dismissed against United Porcelain Co., Inc. on the merits, and this third-party defendant-appellant appeals from each and every part of said amended judgment on liability and on the law and facts and from the whole thereof.

Dated: New York, New York
June 3, 1974.

COPPOLA & D'ONOFRIO
Attorneys for Third-Party Defendant, Beaman Corporation
By WILLIAM F. LARKIN
Appellate Counsel
Office & P. O. Address
11 Park Place
New York, New York 10007

Notice of Appeal of the Third-Party Defendant Beaman Corporation From Amended Judgment Entered May 22, 1974

To:

Berman & Frost, Esqs.
Attorneys for Plaintiffs
77 Water Street
New York, New York 10005

Furey & Mooney, Esqs.
Attorneys for Defendant and
Third-Party Plaintiff,
Gulf Oil Corporation
600 Front Street
Hempstead, New York 11550

L. Louis Winokur, Esq.
Attorney for Defendants,
L.P.W. Realty and Lawrence Paul Wolf
88-02 Sutphin Boulevard
Jamaica, New York 11435

A. Allen Stanger, Esq.
Attorney for Defendant Joseph James
10 Columbus Circle
New York, New York

Alexander, Ash, Schwartz & Cohen, Esqs.
Attorneys for Third-Party Defendant
United Porcelain Co., Inc.
801 Second Avenue
New York, New York

Amended Judgment, Entered June 28, 1974.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

This action having come on for trial before the Court and the jury, Honorable Whitman Knapp, United States District Judge presiding and the issues having been duly tried and the jury having duly rendered its verdict and this Court having signed a judgment on March 7, 1974, and the Clerk of the Court having entered the same on March 14, 1974, and the third-party defendant, United Porcelain Co., Inc., having moved by notice of motion returnable on March 15, 1974, and served upon all counsel by mail on March 8, 1974, for an order setting aside the verdict in favor of the defendant and third-party plaintiff against the third-party defendant and the judgment entered thereon and for judgment dismissing the third-party complaint of Gulf Oil Corporation and the cross-claim of Beaman Corporation and the third-party defendant, Beaman Corporation, having moved by notice of motion, dated March 15, 1974 to set aside the verdict in favor of the third-party plaintiff, Gulf Oil Corporation, against the third-party defendant, Beaman Corporation, and for a direction of a verdict in favor of the third-party defendant, Beaman Corporation, against the third-party defendant, United Porcelain Co., Inc., on the former's cross-claim and the Court having received the affirmation of James M. Furey, dated March 11, 1974, in opposition to the motion of United Porcelain Co. Inc., and also the affirmation of James M. Furey, dated March 15, 1974, in opposition to the motion of the third-party defendant, Beaman Corporation, and the affidavit of Irwin H. Haut, sworn to the 29th day of March, 1974, in support of the motion of United Porcelain Co., Inc., and in opposition to the cross-motion of the third-party defendant, Beaman Corporation, for judgment in its favor

against United Porcelain Co., Inc., on the former's cross-complaint and after due deliberation this Court having handed down its memorandum and order, dated May 7, 1974, and filed May 8, 1974, and the supplemental memorandum of May 7, 1974, and filed May 8, 1974, and by said memoranda and order having granted the motion of United Porcelain Co., Inc., and having denied the motion of the third-party defendant, Beaman Corporation, it is

ORDERED AND ADJUDGED that the judgment dated March 7, 1974 be amended in accordance with the aforesaid memorandum and order of May 7, 1974 and the supplemental memorandum of May 7, 1974, and therefore, it is

ORDERED AND ADJUDGED that the plaintiff, James V. McLean, recover of the defendant, Gulf Oil Corporation, the sum of Fifty Thousand Dollars ($50,000.00), together with interest rate of 6% per annum from February 20, 1974 to the date of judgment, to wit, One Thousand Dollars ($1,000.00), making a total of Fifty One Thousand Dollars ($51,000.00), and it is further

ORDERED AND ADJUDGED that the plaintiff, Ethel McLean recover of the defendant, Gulf Oil Corporation, the sum of Six Thousand Dollars ($6,000.00) together with interest rate of 6% per annum from February 20, 1974 to the date of judgment, to wit, One Hundred Twenty Dollars ($120.00) making a total of Six Thousand One Hundred Twenty Dollars ($6,120.00) and it is further

ORDERED AND ADJUDGED that the plaintiff, Joseph Linfante, recover of the defendant, Gulf Oil Corporation, the sum of Thirty Thousand Dollars ($30,000.00) together with interest at a rate of 6% per annum from February 20, 1974 to the date of judgment, to wit, Six Hundred Dollars ($600.00) making a total of Thirty Thousand Six Hundred Dollars ($30,600.00), and it is further

Amended Judgment, Entered June 28, 1974

ORDERED AND ADJUDGED that the plaintiff, Susan Linfante, recover of the defendant, Gulf Oil Corporation, the sum of Four Thousand Dollars ($4,000.00), together with interest rate of 6% per annum from February 20, 1974 to the date of judgment, to wit Eighty Dollars ($80.00) making a total of Four Thousand Eighty Dollars ($4,080.00) together with interest as provided by law and cost when taxed; and as to defendant, L.P.W. Realty Company, and Joseph James, Inc., the plaintiffs take nothing and the action be dismissed as to them on the merits and without costs, and it is further

ORDERED AND ADJUDGED that the defendant and third-party plaintiff, Gulf Oil Corporation, recover in full of the third-party defendant, Beaman Corporation, the amounts paid by it to the plaintiff, James V. McLean, Ethel McLean, Joseph Linfante and Susan Linfante, on the cause of action for indemnity pursuant to written contract, and it is further

ORDERED AND ADJUDGED that the defendant and third-party plaintiff, Gulf Oil Corporation, recover of the third-party defendant, Beaman Corporation, 50% of the sum paid to the plaintiffs, James V. McLean, Ethel McLean, Joseph Linfante and Susan Linfante, on account of the common law cause of action for contribution, and it is further

ORDERED AND ADJUDGED that the third-party plaintiff, Gulf Oil Corporation, recover from Beaman Corporation the amount of reasonable attorneys' fees to be assessed after a hearing, and it is further

ORDERED AND ADJUDGED that the third-party complaint of Gulf Oil Corporation and the cross-claim of the third-party defendant, Beaman Corporation, against United Porcelain Co., Inc., be dismissed on the merits and that

Notice of Appeal by Third-Party Defendant Beaman Corporation From Amended Judgment Entered June 28, 1974

the third-party defendant, United Porcelain Co., Inc., have judgment against Gulf Oil Corporation for costs and disbursements of this action.

Dated: New York, New York
June 26, 1974

WHITMAN KNAPP
U. S. D. J.

Judgment Entered—6/28/74
RAYMOND F. BURGHARDT
Clerk

Notice of Appeal by Third-Party Defendant Beaman Corporation From Amended Judgment Entered June 28, 1974.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SIRS:

Please Take Notice that third-party defendant Beaman Corporation herein appeals to the United States Court of Appeals for the Second Circuit from the amended judgment of the United States District Court for the Southern District of New York in this action entered on June 28, 1974 which judgment ordered and adjudged that plaintiff James V. McLean recover $51,000.00, that plaintiff Ethel McLean recover $6,120.00, that plaintiff Joseph Linfante recover $30,600.00 and that plaintiff Susan Linfante recover $4,080.00, all said plain-

Notice of Appeal by Third-Party Defendant Beaman Corporation From Amended Judgment Entered June 28, 1974

tiffs to recover their respective amounts together with interests and costs against Gulf Oil Corporation, and further ordered and adjudged the dismissal of plaintiffs' action against defendants L.P.W. Realty Company and Joseph James, Inc., and further ordered and adjudged that Gulf Oil Corporation recover in full against third-party defendant Beaman Corporation the amounts paid to the plaintiffs, and further ordered and adjudged that Gulf Oil Corporation recover against the third-party defendant Beaman Corporation 50% of the sums paid to the plaintiffs on the common law cause of action for contribution plus attorneys' fees, and further ordered and adjudged that the third-party complaint of Gulf Oil Corporation and the cross-claim of third-party defendant Beaman Corporation be dismissed against United Porcelain Co., Inc. on the merits, and this third-party defendant-appellant appeals from each and every part of said amended judgment on liability and on the law and facts and from the whole thereof.

Dated: New York, New York
July 12, 1974.

COPPOLA & D'ONOFRIO
Attorneys for Third-Party Defendant,
Beaman Corporation
By WILLIAM F. LARKIN
Appellate Counsel
Office & P. O. Address
11 Park Place
New York, New York 10007

Notice of Appeal by Third-Party Defendant Beaman Corporation From Amended Judgment Entered June 28, 1974

To:

Berman & Frost, Esqs.
Attorneys for Plaintiffs
77 Water Street
New York, New York 10005

Furey & Mooney, Esqs.
Attorneys for Defendant and
Third-Party Plaintiff,
Gulf Oil Corporation
600 Front Street
Hempstead, New York 11550

L. Louis Winokur, Esq.
Attorney for Defendants,
L.P.W. Realty and Lawrence Paul Wolf
88-02 Sutphin Boulevard
Jamaica, New York 11435

A. Allen Stanger, Esq.
Attorney for Defendant Joseph James
10 Columbus Circle
New York, New York

Alexander, Ash, Schwartz & Cohen, Esqs.
Attorneys for Third-Party Defendant,
United Porcelain Co., Inc.
801 Second Avenue
New York, New York

Cross-Notice of Appeal of Defendant Joseph James, Inc., From Amended Judgment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SIRS:

Please Take Notice that the defendant Joseph James, Inc. hereby cross-appeals to the United States Court of Appeals for the Second Circuit from the amended judgment of the United States District Court for the Southern District of New York in this action entered on the docket on June 27, 1974; and the said defendant hereby appeals only from such portion of said judgment as dismisses the said defendant's cross-claims.

Dated: New York, New York
July 22, 1974

Yours, etc.

A. ALLEN STANGER,
Attorney for Defendant
Joseph James, Inc.
Office & P. O. Address
10 Columbus Circle
New York, N. Y. 10019
By: LEWIS I. WOLF

Cross-Notice of Appeal of Defendant Joseph James, Inc., From Amended Judgment.

To:

William F. Larkin, Esq.
Appellate Counsel to
Coppola & D'Onofrio, Esqs.
Attorneys for Third Party Defendant Beaman
Office & P. O. Address
11 Park Place
New York, New York 10007

Berman & Frost, Esqs.
Attorneys for Plaintiffs
Office & P. O. Address
77 Water Street
New York, New York 10005

Furey & Mooney, Esqs.
Attorneys for Defendant-Third Party Plaintiff Gulf
Office & P. O. Address
600 Front Street
Hempstead, New York 11550

L. Louis Winokur, Esq.
Attorney for Defendants L.P.W. and Wolf
Office & P. O. Address
88-02 Sutphin Boulevard
Jamaica, New York 11435

Alexander, Ash, Schwartz & Cohen, Esqs.
Attorneys for Third Party Defendant United
Office & P. O. Address
801 Second Avenue
New York, New York 10017

Cross-Notice of Appeal by Defendant and Third-Party Plaintiff, Gulf Oil Corp., From Amended Judgment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SIRS:

Please Take Notice that the defendant and Third Party Plaintiff, Gulf Oil Corporation, herein cross appeals to the United States Court of Appeals for the Second Circuit from the amended judgment of the United States District Court for the Southern District of New York in this action entered on June 28th, 1974 which judgment ordered and adjudged that plaintiff, James V. McLean recover $51,000.00 that plaintiff, Ethel McLean recover $6,120.00, that plaintiff, Joseph Linfante recover $30,600.00 and that plaintiff, Susan Linfante recover $4,080.00, all said plaintiffs to recover their respective amounts together with interests and costs against Gulf Oil Corporation, and further ordered and adjudged the dismissal of plaintiff's action against defendants L.P.W. Realty Company and Joseph James, Inc. and further ordered and adjudged that Gulf Oil Corporation recover in full against third-party defendant Beaman Corporation 50% of the sums paid to the plaintiffs on the common law cause of action for contribution plus attorneys' fees, and further ordered and adjudged that the third-party complaint of Gulf Oil Corporation and the cross-claim of third-party defendant Beaman Corporation be dismissed against United Porcelain Co., Inc. on the merits, and this defendant and third party plaintiff-appellant appeals from each

Cross-Notice of Appeal by Defendant and Third Party Plaintiff, Gulf Corp. from Amended Judgment.

and every part of said amended judgment on liability and on the law and facts and from the whole thereof.

Dated: Hempstead, New York
July 23, 1974

FUREY AND MOONEY
Attorneys for Defendant and
third party plaintiff Gulf
Oil Corporation
600 Front Street
Hempstead, New York 11550

To:

Berman & Frost, Esqs.
Attorneys for Plaintiff
77 Water Street
New York, New York 10005

L. Louis Winokur, Esq.
Attorney for Defendants
L.P.W. Realty and Lawrence Wolf
88-02 Sutphin Boulevard
Jamaica, New York 11435

A. Allen Stanger, Esq.
Attorney for Defendant Joseph James
10 Columbus Circle
New York, New York

Coppola & D'Onofrio, Esqs. by William F. Larkin
Attorneys for Third Party Defendant—Beaman Corp.
11 Park Place
New York, New York 10007

Alexander, Ash, Schwartz & Cohen, Esqs.
Attorneys for Third Party Defendant—United
Porcelain
801 Second Avenue
New York, New York

THE REPORTER COMPANY, INC.

Case and Brief Printing of all Kinds

Capacity—3000 Pages a Week

Phone 607-865-4131

181 Delaware Street

Walton, New York 13856

STATE OF NEW YORK, :
COUNTY OF DELAWARE, : SS:

I, William Finch , being duly sworn do depose and say: that I am over the age of twenty-one years and employed by The Reporter Company, Inc., Printers at Walton, New York.

That on the 30th day of July , 1974 , at the request of William F Larkin, Attorney at Law,

I served three copies of an Appendix entitled and one copy of an Exhibit Volume "James V. McLean vs. LPW Realty Co." on

Furey & Mooney, Attorneys at Law,

by depositing said three copies in postpaid wrapper at 4 p. m. on this day, in the United States Postoffice at Walton, New York, addressed to the above

Furey & Mooney, 600 Front Street, Hempstead, New York 11550

and that there is a regularly established mail route between Hempstead, New York and Walton, New York.

William Finch

Sworn to before me
this 30th day of July , 1974.

Joan W. Clapperton
Notary Public

JOAN W. CLAPPERTON
NOTARY PUBLIC
DEL. CO., STATE OF NEW YORK
COMMISSION EXPIRES MAR. 30, 1976

United States Court of Appeals
For the Second Circuit

James V. McLean, Ethel McLean, Joseph Linfante and Susan Linfante, Plaintiffs-Appellees,
against
L. P. W. Realty Company, Lawrence Paul Wolf, defendants,
Gulf Oil Corporation, Defendant-Appellant,
Joseph James, Inc., and Joseph James,
Defendants-Appellees-Appellants
O-----O
Gulf Oil Corporation, Third Party Plaintiff-Appellant-Appellee

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York , ss:

Bernard S. Greenberg being duly sworn,

deposes and says that he is over the age of 21 years and resides at
162 East 7th Street, New York, N.Y.
That on the 31st day of July , 19 74
he served the annexed Brief for Appellant Beaman (3 copies) upon
Appendix (2 copies)
Exhibit volume(1 copy)

McNulty & McNulty of counsel to A. Allen Stanger
Attorney for Defendants-Appelles-Appellants,
Joseph James, Inc. and Joseph James,
10 Columbus Circle,
New York, N.Y.

Berman & Frost,
Attorneys for Plaintiffs-Appellees,
77 Water Street,
New York, N.Y. 10005

Alexander, Ash, Schwartz & Cohen,
Attorneys for Third Party Defendant-Appellee,
United Porcelain Co., Inc.,
801 Second Avenue,
New York, N.Y..

in this action, by delivering to and leaving with said attorneys the copies as specified above to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 31st day of July, 19 74

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1975

Bernard S Greenberg